Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

JORGE E. APONTE and DANIEL PAGÁN,

Petitioners,

v.

SILA MARIA CALDERÓN; ADOLFO KRANS; CONJUGAL PARTNERSHIP KRANS-CALDERÓN; DAVID NORIEGA-RODRIGUEZ; ILEANA COLÓN-CARLO; CARMEN RITA VELEZ-BORRAS; PEDRO GALARZA; PEDRO LOPEZ-OLIVER and ANGEL HERMIDA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The current Governor of Puerto Rico, by Executive Order, created a Blue Ribbon Commission to investigate and evaluate governmental transactions conducted by members of the prior administration. The Commission, which operates without legislative or judicial oversight, has issued reports determining that petitioners committed criminal violations as high-ranking members of the prior administration. The district court enjoined the Commission and the Governor from conducting further investigations without first affording constitutional protections to the persons under investigation. The First Circuit reversed, holding that the constitutional protections of the Due Process Clause are triggered only when there is an actual adjudication, which in the Court's opinion the Commission had not made.

The specific constitutional questions presented are:

1. Whether the protections afforded by the Due Process Clause are triggered only when the Commission conducts a formal adjudication, or also when the Commission exercises an accusatory function, advertises its findings, and serves as part of the process of criminal prosecution, or when the Commission exercises a function akin to making an official adjudication of criminal culpability.

2. Whether the Commission's procedures meet the minimal procedural requirements made obligatory on the States by the Due Process Clause.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The district court's opinion (per Fuste, D.J.) granting petitioners' request for a permanent injunction (Appendix ("Pet. App.") 44a - 117a) is published at 176 F. Supp. 2d 135. The district court's subsequent opinion reaffirming that holding and denying respondents' motion to stay or modify the injunction pending appeal and for reconsideration (Pet. App. 31a - 43a) is not published. The court of appeals' opinion (per Torruella, C.J., joined by Selya and Lipez, CJJ.) reversing (Pet. App. 1a - 30a) is published at 284 F.3d 184. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 119a - 120a) is not published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and judgment on March 22, 2002, and denied rehearing and rehearing en banc on April 25, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners rely on the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1.

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make

> or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Jorge E. Aponte and Daniel Pagán, are former high-level functionaries of the prior administration of the Commonwealth of Puerto Rico and members of the New Progressive Party.

Respondent, Sila María Calderón ("Governor Calderón" or the "Governor"), is the current Governor of Puerto Rico and a member of the Popular Democratic Party. After Governor Calderón assumed power, one of the first things she did was issue, on January 31, 2001, Executive Order 2001-06, creating the Independent Citizens' Commission to Evaluate Government Transactions, known in Puerto Rico as the "Blue Ribbon Commission" (the "Blue Ribbon Commission" or the "Commission"). The Commission is composed of private citizens, who are selected by the Governor, are contracted by the Governor's office, and respond directly and exclusively to the Governor. The members of the Commission are also respondents here.

Purportedly, the function of the Commission is to investigate and evaluate governmental transactions and to render reports to the Governor. However, pursuant to the authority granted exclusively by the Executive Order that created it, and without any legislative or judicial oversight, the Commission has utilized the vast powers and resources

of the government of Puerto Rico to conduct investigations of petitioners related to their work for the prior administration. The investigations were carried out without giving petitioners any measure of due process or any reasonable opportunity to defend themselves. During the course of these investigations, petitioners were not given an opportunity to present evidence on their behalf, or to confront evidence against them, or to cross-examine the witnesses who testified against them.

These investigations resulted in the Commission's preparation of various reports, which were made public by Governor Calderón. In those reports, the Commission concludes that petitioners had committed certain acts that violate various provisions of Puerto Rico's Penal Code.

Petitioners filed a complaint in the district court alleging that respondents had violated their rights afforded by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and requested declaratory and injunctive relief, damages, and other remedies. The district court's jurisdiction was predicated on 28 U.S.C. § 1331.

The district court held an evidentiary hearing on November 6-8, 2001 and on November 29, 2001 issued its opinion (Pet. App. 44a - 117a). The district court concluded (1) that the Commission had conducted criminal investigations against petitioners without giving them any opportunity to present evidence on their behalf, or to confront the evidence against them, or to cross-examine the witnesses against them; (2) that the Commission had made findings that petitioners committed acts that violate various sections of the Puerto Rico Penal Code; (3) that such findings were contained in the Commission's reports submitted to the

Governor; (4) that the Governor had approved the contents of the reports and ordered their publication; and (5) that the Governor held press conferences with members of the Commission in which the Commission's findings were disseminated to the public.

The district court also determined that *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (when a commission "does not adjudicate in the sense that a court does" and does not "conduct, strictly speaking, a criminal proceeding" but "exercises a function very much akin to making an official adjudication of criminal culpability," it must afford the procedural safeguards established by the Due Process Clause to those persons who are investigated) was a controlling decision that compelled the court to hold that respondents had violated petitioners' rights afforded by the Due Process Clause. The district court, thus, granted the declaratory and injunctive relief petitioners had requested, and forbid respondents from holding investigative hearings without providing individuals under investigation an opportunity to present testimonial and documentary evidence on their own behalf and to confront and cross-examine witnesses.

On respondents' appeal, the First Circuit reversed in an opinion remarkable for its fundamental inconsistency with governing precedent of this Court. The First Circuit held that petitioners had failed to assert a constitutionally protected interest "because there has been no adjudication of criminal liability or of [petitioners'] legal rights." The First Circuit's holding is contrary to controlling decisions of this Court. *Joint Anti-Fascist Commission v. McGrath*, 341 U.S. 123 (1951); *Hannah v. Larche*, 363 U.S. 420 (1960); *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, the First Circuit's decision conflicts with controlling decisions of this Court. The First Circuit's decision establishes as a rule that the protections afforded by the Due Process Clause are triggered *only* when there is a formal and binding *adjudication* by an investigative commission created by executive order. That rule is contrary to this Court's prior controlling decisions in *Hannah v. Larche*, 363 U.S. 420 (1960) (when there is an adjudication *or* a binding determination which directly affects the legal rights of individuals, due process requires that judicial procedures be used) and *Jenkins v. McKeithen*, 395 U.S. 411 (1969) (procedural safeguards are required if an investigative commission "exercises a function very much akin to making an official adjudication of criminal culpability").

Second, the First Circuit's decision effectively encourages the current Governor of Puerto Rico to continue to violate, for political reasons, the elementary and fundamental requirements of due process guaranteed to the citizens of Puerto Rico by the Due Process Clause of the Fourteenth Amendment to the Constitution.

ARGUMENT

A. The Blue Ribbon Commission.

The origins of the Blue Ribbon Commission lie in the Puerto Rico electoral campaign of the year 2000. Governor Calderón was at that time the Popular Democratic Party's candidate for governor. During the campaign, candidate Calderón publicly accused the then-incumbent administration

of the New Progressive Party of wide-ranging corruption. As part of the political platform of the Popular Democratic Party, candidate Calderón promised to create a commission composed of private citizens to investigate corruption allegedly committed by public officials under the New Progressive Party administration. Governor Calderón prevailed in the elections and soon after taking office promulgated Executive Order No. 2001-06, which created the Commission.

Executive Order No. 2001-06 expresses the purpose of seeking the cooperation of the entire citizenry in the fight against public corruption by establishing the Commission, which is composed of private citizens, purportedly representative of society. The Commission is afforded broad powers to (1) evaluate significant government transactions which the Commission deems to warrant evaluation; (2) request from any person or entity any sort of information related to the transaction under evaluation when the Commission deems it relevant; (3) require the assistance of functionaries of the executive branch of government to compel the appearance of any person and/or the production of any document when the Commission deems it to be necessary; (4) issue to the Governor such reports as the Commission deems appropriate, including recommendations that administrative, civil or *criminal* proceedings be undertaken against certain persons; (5) approve their own internal by-laws and regulations; and (6) employ attorneys, investigators and other supporting staff.

The Executive Order establishes that the agencies of the Executive branch shall provide the Commission with the support necessary for the performance of its functions. The proceedings of the Commission are carried out in strict

confidentiality, and only the Governor may authorize the publication of the Commission's reports. The chairperson of the Commission is also its sole spokesperson.

When the Executive Order was promulgated, Governor Calderón appointed respondents David Noriega-Rodríguez, Ileana Colón-Carlo, Carmen Rita Vélez-Borrás, Pedro Galarza and Pedro López-Oliver as the members of the Commission, Noriega-Rodríguez being the Commission's chairperson. Respondent López-Oliver resigned from the Commission on June, 2001, and was immediately replaced by respondent Angel Hermida. The members of the Commission are appointed by the Governor, serve at the Governor's pleasure and can be removed by the Governor at any time. The members of the Commission receive compensation through professional services contracts with the Governor's Office.

Whenever the Commission decides to investigate a particular governmental transaction, its members proceed by private, confidential and strictly privileged hearings to ascertain facts about alleged violations of governmental policy, regardless of whether the consequences for the persons under investigation are civil or *criminal* in nature. Although on paper the scope of the Commission's authority is not explicitly limited by the Executive Order to violations of criminal laws, its involvement in probing *criminal* violations is patently clear.

During regular meetings held on February 20 and March 13, 2001, the Commission approved a set of operational by-laws. These by-laws deal with the structure of the Commission, created the positions of Executive Director and Legal Advisor, and establish some conduct guidelines for its

members. However, during the evidentiary hearing held by the district court, respondent Noriega testified that a second set of by-laws, which was deemed to be strictly confidential, had been approved on February 27 and March 27, 2001. This second set of by-laws (Pet. App. 108a - 116a) is far more relevant to the investigations and proceedings performed by the Commission, as it covers topics such as the solicitation of assistance from the executive branch to compel the attendance of witnesses and the production of documents, the issuance of summonses, directives as to the course of action to take when witnesses refuse to testify or produce documents, the manner in which interviews are to be conducted and sworn statements taken, the procedure for interviewing witnesses suspected of having committed violations of criminal laws and norms of confidentiality. The most relevant features of this set of by-laws indicate that witnesses are not allowed to take notes or to record their testimony, the Commission does not provide them copies of their testimony, the hearing officer or the person in charge of the investigation may seek the presence of a prosecutor or other representative of the Department of Justice during any interview when such presence would advance the purposes of the interview, and there is no required method for recording the proceedings.

In practice, the Commission gives a witness only limited notice of the subject matter of the investigation before being asked to appear and testify. The witness may be allowed to bring an attorney to the interview; however, his role is very limited, since counsel may not question his client as to any relevant matter, may not examine or cross-examine other witnesses, and may not even submit to the Commission proposed questions to be asked to any other witnesses appearing. Finally, a person who may be incriminated or

defamed as a result of the publication of the Commission's report is not provided any opportunity to further appear and be heard or to call witnesses on his behalf.

To conduct its investigations, the Commission employs an investigative staff led by Brenda M. León-Suárez, an attorney and Former Special Independent Prosecutor, who is also the Commission's Executive Director. The investigators conduct hearings, at which they receive testimony from witnesses. Ms. León-Suárez provides progress reports to the Commissioners on the status of pending investigations. Later, Ms. Leon-Suárez, in conjunction with the other investigators, prepares a draft of the findings which will serve as the basis for the Commission's report to the Governor. The Commissioners then discuss the findings and draft the conclusions and recommendations portion of the report. When the report is completed, it is submitted to the Governor, with its accompanying exhibits, which consist of letters, contracts, notes of interviews, sworn statements, etc. After the report is submitted to the Governor, the Commissioners discuss the findings with the Governor, prior to the holding of a press conference to disclose to the public the contents of the report. Finally,

> at any moment during the process of the investigation, in which the person in charge of same has any evidence, further than a mere suspicion, that someone many have incurred in criminal conduct, he/she shall immediately report this to the Commission . . . [which] may refer the matter to the Department of Justice for whatever action said agency may deem appropriate.

(Pet. App. 114a).

B. The Commission's Investigation of Petitioners.

1. *Aponte*

Petitioner, Jorge E. Aponte, is a certified public accountant who, from 1993 to 2000, was the Director of the Office of Management and Budget for the Commonwealth of Puerto Rico, with the responsibility of managing the entire budget of the government. He was appointed to that office by former Governor Pedro Rosselló, a member of the New Progressive Party, and responded directly to him. He resigned from this position on December 31, 2000.

On March 21, 2001, an armed agent of the Special Independent Prosecutor's Office and a Treasury Department agent delivered a summons to Aponte's home. This summons requested Aponte's appearance at a hearing scheduled for the afternoon of March 29, 2001, but did not disclose the specific subject matter of the hearing.

Petitioner Aponte appeared at the Commission's office at the designated time, where he handed a letter to Ms. León-Suárez requesting the following: (1) a copy of Executive Order No. 2001-06; (2) copy of the Commission's by-laws; (3) the specific topic to be discussed at the hearing; (4) a copy of any legal opinion issued by the Attorney General of Puerto Rico explaining the legal basis for the Commission's ability to compel the assistance of witnesses before it; and (5) information regarding the appointment of counsel to assist him in the proceedings. Ms. León-Suárez responded to Aponte's request by letter of April 11, 2001, to which she attached a copy of the executive order and a copy of the Commission's operational by-laws, but not of the secret "Guidelines for Investigation and Drafting of Reports," which

only surfaced during the district court's evidentiary hearing. The letter informed Aponte that the Commission was interested in his testimony regarding the purchase of a building located at 306 Barbosa Avenue in San Juan and the contiguous lot at 307 Italia Street, and summoned him to appear at a hearing scheduled for April 19, 2001.

Petitioner Aponte attended the hearing believing that he would only be a witness. He was unaware that the Commission was investigating him for misconduct, and believed that if he refused to appear, the Commission would conclude that he was hiding something. Further, he believed, after reading the documents provided to him by the Commission, that if he refused to appear he would have been forced to appear under compulsion of legal process.

During the hearing, which took place on April 19, 2001, Aponte was interviewed by four investigators of the Commission, including Ms. León-Suárez. Aponte told the investigators he believed the Commission was unconstitutional and asked to record or take notes of the hearing. Ms. León-Suárez refused his request. When the investigators began to take notes of the proceedings, Aponte requested a copy of their notes, but this request was also denied. Ms. León-Suárez asked Aponte if he would be willing to have a stenographer record the hearing, but Aponte refused, because he could not verify the accuracy of the stenographer's record and did not have the assistance of an attorney.

During the hearing, Aponte was not advised of any constitutional rights that may have applied to him, but the Commission's investigators nevertheless questioned him regarding the Barbosa 306 transaction.

2. *Pagán*

Petitioner, Daniel Pagán, is an engineer who occupied the position of Director of the Solid Waste Management Authority from 1993 to 1996. In 1996, former Governor Rosselló appointed him to the Cabinet-level position of Secretary of the Department of Natural and Environmental Resources, a position he occupied until December 31, 2000.

On March 22, 2001, an armed agent of the Puerto Rico Department of Justice's Special Investigations Bureau served petitioner Pagán at his home with a summons to appear before the Commission on March 27, 2001. In a letter dated March 26, 2001, Pagán notified Ms. León-Suárez that he could not attend because he had a previous appointment to appear before the Puerto Rico Legislature March 27.

Pagán believed that, although the Commission did not have the power to subpoena him, he was nevertheless required to appear. This belief was based on his prior experience working along with the Department of Justice on some criminal investigations, and the fact that an armed law enforcement agent had served him with the summons at his home.

On the morning of April 25, 2001, Pagán appeared at the Commission's offices. He arrived alone because he did not think he needed the assistance of an attorney. He was interviewed for three hours by Ms. León-Suárez and two other investigators. During the interview, Pagán was not given any specific advice as to any legal right he may have in the context of the Commission's investigation, he was not advised of any circumstance under which he would have been entitled to have an attorney present at the hearing, and he was not

told that he had a right to bring witnesses or present other evidence in his behalf. Pagán requested that he be allowed to record the proceeding or take notes, but Ms. León-Suárez denied both requests.

One of the investigators interviewing him equated the interview with a grand jury proceeding and explained to Pagán that witnesses testifying before a grand jury were not allowed to take notes or record proceedings. Pagán then realized that he was the subject of the Commission's investigation, and he requested a copy of the internal procedural guidelines used by the Commission. Ms. León-Suárez agreed to answer this request later, but failed to do so. At the hearing before he realized he was a target of the investigation, Pagán offered information and documentary evidence to the Commission. Pagán did not testify under oath and he did not sign any sworn statement, but the investigators reduced his interview to writing. Pagán was not allowed to confront any witnesses testifying against him.

The district court ultimately determined that both, Aponte and Pagán were interrogated by the Commission at a very late stage of the investigation. In fact, Pagán was the last witness interviewed. Therefore, when petitioners appeared before the Commission, they were already targets of the investigation, but they were not advised of their legal rights prior to their interrogations.

C. The Commission's Reports.

On May 1, 2001, six days after having interrogated Pagán, the Commission issued its first report on the Barbosa 306 investigation, entitled "Irregularities in the Acquisition of the Building Located at 306 Barbosa and the Adjacent Lot at 307 Italia Street."

The findings contained in the report substantively accuse petitioners of having committed criminal offenses, even though the report does not refer to specific provisions of the Puerto Rico Penal Code. The report states:

> It can be said that the several functionaries of both agencies who handled the several levels of this transaction were at the very least grossly and unforgivably negligent in the performance of their obligation to protect the public interest.
>
> * * * *
>
> So that even supposing that the questionable behavior of the various functionaries of the Department of Natural and Environmental Resources (DRNA) and those of the Office of Management and Budget (OGP) involved in the transaction was not the result of a conspiracy to defraud the public treasury, it is necessary to conclude that those functionaries were at least repeatedly and grossly negligent in handling the matter.

This report also contains the following specific conclusion against petitioners:

> . . . The data compiled by the Commission in this case clearly revealed that both CPA Jorge Aponte, then Director of the OGP, and engineer Daniel Pagán, then Secretary of the DRNA, at the very least were grossly negligent in assigning the function of negotiating a multi-million-dollar transaction to certain subordinate functionaries

> who, in the Commission's judgment, lacked the necessary capability to handle a matter of such magnitude. Those data further reveal that both Messrs. Aponte and Pagán at the very least were repeatedly and grossly negligent in failing to adequately supervise the dealings that their aforesaid subordinates were making in the aforesaid transaction.

The district court found that the report accused petitioners of activities prohibited by Sections 4366 and 4391 of the Puerto Rico Penal Code, 33 P.R. Laws Ann. §§ 4366, 4391.

On May 9, 2001, Governor Calderón, Commissioner Noriega-Rodríguez, and other Commissioners held a press conference to disclose the findings of the Commission's investigation regarding the lease and purchase of the Barbosa building. Prior to the press conference, Governor Calderón had met with leaders of the Puerto Rico Legislature, one of whom stated publicly that the Commission's report contained accusations of a criminal nature. At the press conference, defendant Calderón announced that she was referring the matter to the Attorney General of Puerto Rico, as the Commission had recommended. In addition to the accusations of criminal misconduct included in the report against both petitioners, at the press conference respondent Noriega-Rodríguez speculated that petitioner Aponte might have personally profited from the Barbosa transaction.

As of the time of the press conference, petitioners had not been afforded an opportunity to respond to the Commission's conclusions and had not even received a copy of the report. On May 11, 2001, petitioner Pagán requested

in writing from Ms. León-Suárez a copy of the Commission's report. Three days later, Ms. León-Suárez notified Pagán that she was not authorized to provide him with copy of the report, and that she had forwarded his request to the Governor's Office. On May 15, 2001, the legal advisor to the Governor informed Pagán that he could obtain copy of the document through the Governor's Office. Pagán then picked up a copy of the Commission's report, which did not contain any of the exhibits or any evidence upon which the Commission relied to reach its conclusions.

In a letter dated July 30, 2001, less than two weeks after the complaint was filed in the district court, Ms. León-Suárez requested that Pagán appear for a second time before the Commission, on August 6, 2001, regarding its investigation of the remodeling of the Barbosa 306 building and a contract between a company named PRIME and the Solid Waste Management Authority. Pagán chose not to appear at the scheduled hearing.

On October 31, 2001, the Commission issued the first part of a report on its investigation into the contract between the Solid Waste Management Authority and PRIME. On that same date, Governor Calderón and the Commissioners held a press conference to disclose to the public the contents of the report. The report stated the following conclusion:

> Then-Secretary of the DRNA, Engineer Daniel Pagán-Rosa, improperly intervened in the stage of reconsideration of the awarding of a bid procedure to the ADS for a project for the recovery of clean material at the municipality of Toa Baja in particular. And after the bid board of the ADS had adjudicated said bid and they had

> reaffirmed their decision to deny a motion for reconsideration, Engineer Pagán-Rosa ordered the president of the bid board to cause the disappearance of the documents which evidenced this last decision of the board, and in its place the board should annul the previously adjudicated bid.

The district court found that the Commission had concluded that Pagán had committed undue intervention in the performance of contracts, bidding procedures or government operations, actions prohibited by Section 4353a of the Puerto Rico Penal Code, 33 P.R. Laws Ann. § 4353a. The district court also found that, according to the report, Pagán could be prosecuted for committing destruction or mutilation of public documents in violation of Section 4356 of the Puerto Rico Penal Code, 33 P.R. Laws Ann. § 4356.

Governor Calderón forwarded the report to the Attorney General, who in turn referred the matter to the Special Independent Prosecutor. The Attorney General had been aware of the Commission's investigation of PRIME since August, 2001, and the Commission had been working in close collaboration with the Department of Justice.

On November 1, 2001, the Commission submitted the second part of the PRIME report to Governor Calderón. At the hearing held by the district court on November 6-8, it became known that the Commissioners had given the Governor a presentation about the report, but as of November 8, 2001, she had not read the document. On November 4, 2001, less than two days before the evidentiary hearing was to be held, the Attorney General referred the matter to the Special Independent Prosecutor for further proceedings.

D. The decision below departs from this Court's prior controlling opinions and establishes a rule requiring Due Process Clause protections only when there is a formal and binding adjudication, but not when a commission exercises a function that is very much akin to an official adjudication of culpability, or when there is an otherwise binding determination which directly affects the legal rights of individuals, or when the commission's function becomes accusatory in nature.

1. A formal adjudication is not required in order to trigger constitutional protections.

The district court held that the present case is governed by this Court's decision in *Jenkins v. McKeithen*, 395 U.S. 411 (1969). The district court determined that petitioners had established their claims for violations of the Due Process Clause because (1) respondents' actions were tantamount to an official adjudication of petitioners' criminal culpability, without previously affording them due process of law; and (2) the Commission exercised an accusatory function, in violation of the rule announced by this Court in *Jenkins*.

The First Circuit disagreed. The Court held that *Jenkins* is not applicable to this case because (1) the constitutional protection of the Due Process Clause are triggered *only* when there is an actual and binding *adjudication*; and (2) the Commission did not make a final, binding adjudication of criminal liability or of petitioners' legal rights.

Furthermore, relying on *S.E.C. v. Jerry T. O'Brien*, 467 U.S. 735 (1984), a case that is not even applicable on the facts or the law, *see Donaldson v. United States*, 400 U.S. 517 (1971) (Douglas J., concurring) (when the result of an investigation conducted by an administrative agency will be a determination of whether to bring criminal charges, the rule of *Jenkins* applies), the First Circuit held that the Commission's activities were similar to administrative investigations performed by agencies, which do not trigger Due Process Clause protections. The First Circuit committed error.

The Fourteenth Amendment to the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law." A State may not deprive an individual of a significant interest in liberty or property without first warning the individual and providing him an opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Joint Anti-Fascist Commission v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring) (The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardship of a criminal conviction, is a principle basic to our society.")

In *Jenkins*, this Court addressed the constitutionality of a statute enacted by the Louisiana legislature, which created the Labor-Management Commission of Inquiry (the "Louisiana Commission"). The stated purpose of the Louisiana Commission was "the investigation and findings of fact relating to violations or possible violations of criminal

laws of Louisiana or the United States arising out of or in connection with matters in the field of labor-management relations." *Jenkins, supra*, at 414.

The Louisiana Commission was composed of nine members appointed by the governor. It was empowered to act only upon referral by the Governor when, in his opinion, there was substantial indication that there were or could be widespread or continuing violations of existing criminal laws affecting labor-management relations. *Jenkins*, *supra*, at 415. Upon referral by the Governor, the Commission could hold public hearings to ascertain the facts regarding the alleged violations. The Louisiana Commission was empowered to approve its own rules and regulations, to employ attorneys, investigators and support staff, to compel the attendance of witnesses, to examine them under oath, and to require the production of books, records and other evidence. *Jenkins*, *supra*, at 415.

"The commission [was] required to determine, in public findings, whether there [was] probable cause to believe that violations of criminal laws had occurred. However, the Commission had no power to adjudicate." *Jenkins, supra*, at 416. The Louisiana statute at issue specifically stated:

> The commission shall have no authority to and it shall make no binding adjudication with respect to such violation or violations . . .

While it lacked authority to make binding adjudications, the Louisiana Commission could include in its findings its conclusions as to specific individuals and recommend to the Governor whatever action the Commission deemed appropriate. *Jenkins*, *supra*, at 417.

Witnesses summoned by the Commission were given notice of the general subject matter of the investigation before being asked to appear and testify. Witnesses had the right to the presence and advice of counsel, subject to reasonable limitations that the Commission could impose in order to prevent interference with the orderly conduct of the hearing. Counsel could question his client as to any relevant matters, but his right to examine other witnesses was limited. *Jenkins*, *supra*, at 417-418. A witness or private party had no right to call anyone to testify before the Commission, except when it appeared that the testimony to be given could tend to degrade, defame or incriminate any person, in which case the person who could be affected was allowed the opportunity to appear in executive session, be heard and present a reasonable number of witnesses on his behalf. *Jenkins*, *supra*, at 418.

On direct appeal to this Court from a decision by a three-judge panel that granted a motion to dismiss appellant's suit, this Court held that appellant had stated a cause of action for violation of his right to due process of law and reversed. In so doing, this Court noted that "the Commission [did] not adjudicate in the sense that a court does, nor [did] the Commission conduct, strictly spending, a criminal proceeding. Nevertheless, the Act makes it clear that the Commission exercises a function very much akin to making an official adjudication of criminal culpability."

In the opinion, this Court reaffirmed rule announced in *Hannah v. Larche* that

> . . . when governmental agencies adjudicate *or make binding determinations which directly affect the legal rights of individuals*, it is imperative that

> those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Hannah, 363 U.S. at 442. (Emphasis added). Furthermore, this Court reiterated its agreement with Justice Frankfurter's concurring opinion in *Hannah*, where he made it clear that when the work of an investigative commission is a "part of the process of criminal prosecution," the Constitutional protections of the Due Process Clause are triggered:

> Were the (Civil Rights) Commission exercising an accusatory function, were its duty to find that named individuals were responsible for wrongful deprivation of voting rights and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides.

Jenkins, *supra*, at 428, citing *Hannah*, 363 U.S. at 488 (Frankfurter, J. concurring).

In this regard, Justice Frankfurter further stated in *Hannah*:

> In appraising the constitutionally permissive investigative procedure claimed to subject individuals to incrimination or defamation without adequate opportunity for defense, a relevant distinction is between those proceedings which are preliminaries to official judgments on individuals and those, like the investigation of this Commission, charged with responsibility to gather information as a solid foundation for legislative action. *Judgments by the Commission condemning or stigmatizing individuals are not called for. When official pronouncements on individuals purport to rest on evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigations, except, of course, grand jury investigations.* The functions of that institution and its constitutional prerogatives are rooted in long centuries of Anglo-American history. On the other hand, to require the introduction of adversary contests relevant to determination of individual guilt into what is in effect a legislative investigation is bound to thwart it by turning it into a serious digression from its purpose.

Hannah, *supra*, at 489-90 (Frankfurter, J. concurring) (emphasis added).

Thus, neither *Hannah* nor *Jenkins* requires that there be a full and complete adjudication in order to trigger due process requirements. Instead, *Hannah* requires

"adjudicat[ion] *or* . . . a binding determination which directly affects the legal rights of individuals," while *Jenkins* requires "a function very much akin to making an official adjudication of criminal culpability." The First Circuit's holding on this point is wrong.

2. This Court's decision in *Jenkins* is dispositive of this case.

In *Jenkins* this Court determined that the procedures of the Louisiana Commission did not meet the minimal requirements made obligatory upon the States by the Due Process Clause. First, the Act that created the Louisiana Commission severely limited the right of persons investigated to confront and cross-examine the witnesses against them, by only allowing persons actually appearing as witnesses to question other witnesses, and by limiting such cross-examination to those questions which the Commission deemed appropriate. This Court made it abundantly clear that "where the Commission makes an actual finding that a specific individual is guilty of a crime, we think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights." *Jenkins*, *supra*, at 429.

Second, this Court also determined that the Louisiana Commission's procedures drastically limited the right of a person being investigated to present evidence in his own behalf, an essential element of the fair hearing required by the Due Process Clause. This Court concluded that a person's right to present his case should not have been left to the unfettered discretion of the Commission. *Jenkins*, *supra*, at 429.

Similarly, in our case the district court determined that the Blue Ribbon Commission is similar to the Louisiana Commission on several aspects. First, the Blue Ribbon Commission is involved in investigating criminal activity and making findings that specific individuals are engaged in criminal conduct. This is conclusively demonstrated by the contents of the Blue Ribbon Commission's reports and the investigation guidelines the Commission secretly approved.

Second, the Blue Ribbon Commission supplements the efforts of other law enforcement agencies in the investigation of criminal violations, just like the Louisiana Commission did. This finding is supported by the Executive Order and the referral of evidence against petitioner Pagán to the Puerto Rico Department of Justice during the investigation of the PRIME contract.

Third, the Executive Order empowers the Blue Ribbon Commission to adopt its own by-laws and employ investigative and support staff, just as the Louisiana Commission was allowed to do.

Fourth, the Blue Ribbon Commission may compel the attendance of witnesses and the production of documentary evidence, just as the Louisiana Commission could do. The Executive Order empowers the Blue Ribbon Commission to request from the agencies of the executive branch aid to perform its duties and may request their assistance to obtain a court order compelling the appearance of witnesses.

Fifth, the Executive Order imposes upon other governmental agencies the duty to assist the Commission. For example, the Blue Ribbon Commission easily obtains the cooperation of the executive branch, as demonstrated by

the fact that armed law enforcement officials from different agencies served upon petitioners at their homes the summonses issued by the Commission.

Sixth, like the Louisiana Commission, the Blue Ribbon Commission does not function in an adjudicative capacity in the same manner that a court does — it lacks the power to render adjudications that are binding on any person. However, it can make recommendations to the Governor to take further action and prosecute named persons.

The district court went on to conclude that the Blue Ribbon Commission "makes actual findings that named individuals are guilty of criminal violations as part of a process of criminal prosecution." The district court further concluded that the procedures employed by the Blue Ribbon Commission are less protective than those declared unconstitutional by this Court in *Jenkins*. While the Louisiana Commission offered individuals only a limited opportunity to examine other witnesses, the Blue Ribbon Commission does not recognize that right at all. While the Louisiana Commission, under certain circumstances, allowed a person being investigated the opportunity to present evidence and witnesses on his behalf, the procedural regulations of the Blue Ribbon Commission do not offer individuals such opportunity.

Thus, in view of the similarities between the Louisiana Commission and the Blue Ribbon Commission, the district court was entirely correct in determining as a matter of law that this Court's decision in *Jenkins* is directly dispositive of the present case, and that the Blue Ribbon Commission had failed to provide petitioners with due process of law before adjudicating their criminal liability and branding them as criminals in public.

It is true that the Blue Ribbon Commission does not adjudicate in the sense that a court does, and it does not conduct, strictly speaking, a criminal proceeding. But it is equally true that the Commission exercises an accusatory function, advertises its findings of petitioners' criminal culpability, and serves as part of the process of criminal prosecution of petitioners. The Commission's by-laws, when analyzed in light of the actions taken by the Commission against petitioners, leave no doubt that the Commission exercises a function very much akin to making an official adjudication of criminal culpability. Consequently, it is clear that its procedures do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment. The First Circuit's holding on this point is also wrong.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT WITH JUDGMENT DATED MARCH 22, 2002

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 01-2705
01-2706

JORGE E. APONTE; DANIEL PAGÁN

Plaintiffs, Appellees,

v.

SILA MARÍA CALDERÓN; ADOLFO KRANS; CONJUGAL PARTNERSHIP, KRANS-CALDERÓN,

Defendants, Appellants,

DAVID NORIEGA-RODRÍGUEZ; ILEANA COLÓN-CARLO; CARMEN RITA VÉLEZ-BORRÁS; PEDRO GALARZA; PEDRO LÓPEZ-OLIVER; ANGEL HERMIDA.

Defendants, Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO
[Hon. José Antonio Fusté, *U.S. District Judge*]

Appendix A

Before
Torruella, Selya and Lipez,
Circuit Judges.

* * *

TORRUELLA, *Circuit Judge.*

Defendants-appellants challenge the district court judgment granting plaintiffs-appellees injunctive and declaratory relief. *See Aponte v. Calderón,* 176 F. Supp. 2d 135 (D.P.R. 2001). Plaintiffs-appellees originally brought suit challenging the constitutionality of the Independent Citizens' Commission to Evaluate Government Transactions ("Blue Ribbon Commission" or "Commission"), which was created by appellant Sila M. Calderón through an executive order. They alleged, inter alia, that the Commission violated appellees' rights to due process of law, as guaranteed by the Fourteenth Amendment of the United States Constitution. The district court agreed and entered a permanent injunction forbidding the Commission from engaging in future investigations without instituting trial-type procedures. Because we find that the Commission's investigation implicates no constitutionally protected liberty or property interest of the appellees, we reverse the district court's grant of injunctive and declaratory relief.

Appendix A

I. Factual Background

A. The Creation and Structure of the Blue Ribbon Commission

Appellant Sila María Calderón was elected Governor of the Commonwealth of Puerto Rico in November 2000. Shortly after taking office in January 2001, she promulgated Executive Order No. 2001-06 ("Order"). The Order states that there is a "pressing need" to make "proper and efficient use of public resources" and to complete "the total erradication [sic] of government corruption." To further that effort, the Order creates the "Independent Citizens' Commission to Evaluate Government Transactions . . . for the purpose of evaluating significant government transactions."

The Order gives the Blue Ribbon Commission the power to evaluate transactions accomplished by the executive branch of the Puerto Rican government. These transactions may have been completed by either the current or previous administrations and must "have the potential of substantially impacting on areas such as the government's structure, the public treasury, the country's economy and infrastructure, or the citizenry's trust in government institutions." To further these evaluations, the Order gives the Commission the authority to request information from natural and artificial persons, to require the assistance of the executive branch, and to issue reports to the Governor, including both the findings of any investigation and any recommendations. These recommendations may include the adoption of "new statutory or regulatory rules," the modification of existing rules, and further proceedings, either administrative, civil,

or criminal, against certain persons. The Order also provides that the Commission shall operate with strict confidentiality. Only the Governor has the power to publicize the findings, recommendations, or evidence collected by the Commission.

The Governor also has the exclusive power to name Commission members. She originally appointed appellants David Noriega-Rodríguez, Ileana Colón-Carlo, Carmen Rita Vélez-Borrás, Pedro Galarza, and Pedro López-Oliver. Noriega-Rodríguez was made Chairperson. Galarza and López-Oliver have both resigned from the Commission, and appellant Angel Hermida replaced López-Oliver.[1]

The Commission has the power to adopt internal operating rules. Pursuant to that power, the Commission promulgated both Operating By-Laws ("By-Laws") and Guidelines for Investigation and Drafting of Reports ("Guidelines"). Only the By-Laws were made public by the Commission. The unpublished Guidelines, however, provide most of the substantive procedures that the Commission and its staff follow in conducting their investigations.[2]

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1. Adolfo Krans, Governor Calderón's husband, is the final appellant. Appellees originally sued Krans, the conjugal partnership of Krans and Governor Calderón, the various unnamed spouses of the Commission members, their conjugal partnerships, and several additional unnamed defendants.

2. The district court published the Guidelines by attaching a copy to its opinion. *See Aponte v. Calderón,* 176 F.Supp.2d at 168-172. Before this publication, the Guidelines had never been made public. Indeed, the fact that these procedures existed had never been made public.

These procedures include the ability of the Commission to request officers of the executive branch to secure the appearance and testimony of reluctant witnesses, using appropriate legal mechanisms. During interviews, the Commissioners or their staff may record testimony in a variety of ways, including handwritten notes. Witnesses are not allowed to take notes, record their testimony, or obtain copies of their statements. This is ostensibly to protect the confidentiality of the Commission's investigations. Those witnesses who are not considered suspects are not allowed to have an attorney present. However, those witnesses who are suspected of violating laws or regulations of a penal nature are to be advised of their constitutional rights, including their right against forced self-incrimination. The Guidelines also require Commissioners to report any evidence that creates more than a mere suspicion of criminal activity. The Commission, once it has verified such evidence, may refer the matter to the Puerto Rican Department of Justice.

It is also important to note what powers the Blue Ribbon Commission does not have. It does not have the power to independently initiate or file any civil, criminal, or administrative charges. It can only recommend that other agencies do so. Most importantly, the Commission cannot adjudicate criminal liability or make probable cause determinations.

B. The Investigations and Publication of Reports Relating to Appellees

The Blue Ribbon Commission has completed reports on three transactions. Two of those are implicated in this case.

The first concerns the lease and purchase of a building, located at Barbosa Avenue 306, and an adjacent parking lot ("Barbosa Report"). It discusses both appellees. The second details the relationship between the Department of Natural and Environmental Resources, the Solid Waste Authority, and the Puerto Rico Infrastructure Management Group, Inc., a private entity ("PRIME Report"). It discusses only appellee Daniel Pagán. The district court concluded, after holding a hearing, that both reports "find that there is probable cause to believe that violations of Puerto Rico criminal law have occurred." *Aponte,* 176 F.Supp.2d at 144.

Both plaintiffs-appellees served as high-ranking Puerto Rican officials under former Governor Pedro Rosselló. Appellee Jorge E. Aponte was Director of the Office of Management and Budget. Appellee Daniel Pagán was Secretary of the Department of Natural and Environmental Resources. Both Aponte and Pagán held their positions in the Puerto Rican government until December 31, 2000, when Governor Rosselló's term ended.

The Commission interviewed appellee Aponte on April 19, 2001, regarding the Barbosa transaction. This interview occurred after Aponte received a letter at his home, requesting his appearance at a hearing. Originally, the hearing was scheduled for March 29, 2001, but Aponte did not attend due to his concerns about the Commission. Instead, he hand-delivered a letter, which requested a copy of the Commission's by-laws, the subject matter of the hearing, an opinion letter by the Puerto Rican Secretary of Justice explaining the legal basis for the Commission to compel witnesses to attend hearings, and any information on the

appointment of counsel to assist him at the hearing. When he delivered the letter, the Commission's staff informed Aponte that he was not entitled to appointment of counsel. He subsequently received a copy of the Order, the By-Laws, and a letter explaining that the Commission was interested in his involvement in the Barbosa transaction. The letter also rescheduled the hearing for April 19.

Aponte attended the hearing on April 19, based in part on the assurances of the Commission's staff that his testimony was needed only to authenticate certain documents. He did not believe that he, himself, was under investigation for misconduct, and while he knew that his attendance at the hearing was not required by law, he believed that the Commission would draw negative inferences should he refuse to attend. Aponte also concluded, based on his reading of the Order and the By-Laws, that the Commission could require him to appear under compulsion of legal process should he refuse to attend voluntarily.

At the hearing, Aponte objected to the Commission as unconstitutional. He asked to take notes of the proceedings and to have a copy of the investigators' notes, but these requests were denied. Aponte rejected the Commission's request to have a stenographer record the interview. At no point during the interview did anyone advise Aponte of any constitutional rights.

Appellee Pagán was interviewed on April 25, 2001, after an armed agent of the Puerto Rico Department of Justice Special Investigations Bureau ("NIE")[3] delivered a summons

3. NIE is the Spanish acronym.

to Pagán's home. After receiving the summons, Pagán informed the Commission that he was willing to cooperate, despite his belief that the Commission did not have the power to compel his appearance. However, Pagán also believed, based on his former experiences, that he was "required" to appear, although not under legal compulsion. He knew of individuals who had failed to cooperate with NIE investigations and had been subject to formal actions.

Like his fellow appellee, Pagán was interviewed regarding the Barbosa transaction. At the time of his interview, the Commission did not suspect Pagán of any criminal conduct, therefore, the Commission did not inform Pagán of any rights that might have attached had he been a suspect. He requested permission to record or take notes during the hearing, but the Commission denied both requests. The Commission's staff did take written notes on both Pagán's oral testimony and documentary evidence.

On May 9, 2001, Governor Calderón, accompanied by some of the Commissioners, held a press conference at which she discussed the Commission's findings and released copies of the Barbosa Report. The Governor subsequently referred the matter to the Puerto Rican Secretary of Justice. The district court found that the report accuses both appellees of criminal misconduct (although the report itself does not speak in terms of crimes or criminal statutes). The report also contains extensive analysis and conclusions regarding the transaction's utility and wisdom, discusses specific mistakes, and recommends improvements so that similar mistakes do not occur in the future.

Appendix A

At the time of the press conference, neither appellee had received a copy of the Barbosa Report nor been given an opportunity to respond to any charges contained in the report. Pagán later obtained a copy of the Barbosa Report, but he could not review the evidence relied upon by the Commission (which had been attached to the report submitted to the Governor).

The Commission, as part of a later investigation, summoned Pagán to appear at a second hearing, which was to cover the remodeling of the Barbosa building and a contract between PRIME and the Solid Waste Authority. Pagán chose not to appear at this hearing.

A few months later, the Commission finished the PRIME Report and delivered it to the Governor. As with the Barbosa report, the Governor and several Commissioners held a press conference where the report and its findings were discussed. The PRIME Report concludes that Pagán "improperly intervened" in the bidding process of the transaction and that Pagán also caused certain documents to "disappear," requiring the awarded bid to be annulled. It also contains a lengthy analysis of the entire transaction and recommendations for future improvements. Again, Governor Calderón forwarded the report to the Puerto Rican Secretary of Justice for further investigation and proceedings. A second PRIME report was later delivered to Governor Calderón, who, in turn, referred it to the Secretary of Justice.

Appendix A

II. Procedural Background

The district court decided this case after holding a hearing and entertaining various dispositive motions by the parties. The issues raised in these various motions included: (1) whether appellees had stated a valid due process claim; (2) whether appellants are protected by the doctrine of qualified immunity; (3) whether Governor Calderón is entitled to absolute immunity; (4) whether appellees' motion for a preliminary injunction should be granted; and (5) whether the district court should decline to exercise jurisdiction over appellees' state-law claims.

On November 6-8, 2001, the district court held a hearing. This hearing was originally scheduled to address appellees' motion for a preliminary injunction. To prepare for that hearing, the district court issued an order, dated October 16, 2001, advising the parties which issues the court expected to cover in the hearing. The court outlined the final issue as follows: "What other evidence, aside from that properly submitted in a preliminary injunction hearing, do the parties expect that they would present if the case were to be tried on the merits? *See* Fed. R. Civ. P. 65(a)(2)."[4] At the conclusion of the hearing, the district court stated, "I think that there is no reason why I should not give a final adjudication. . . . That's exactly what I intend to do under Rule 65." Neither party objected.

4. Rule 65(a)(2) of the Federal Rules of Civil Procedure provides, in relevant part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

Thereafter, on November 29, 2001, the district court issued the decision that is the subject of this appeal. After deciding that the case was ripe and not an appropriate case for abstention, the court held that (1) Governor Calderón is not entitled to absolute immunity; (2) appellants are not entitled to qualified immunity; (3) the Commission violated appellees' rights to procedural due process, entitling appellees to injunctive and declaratory relief; and (4) the Commission did not violate appellees' right to freedom of association or to equal protection of the laws. The court did not decide the state-law issues raised in appellees' complaint or determine damages.

III. Discussion

Appellants challenge the district court's decision on several grounds. First, they raise a procedural issue as to the court's invocation of Federal Rule of Civil Procedure 65. Second, they contest the court's substantive decision that the Commission violated appellees' due process rights. Third, they argue that Governor Calderón is entitled to absolute immunity regarding her establishment of the Blue Ribbon Commission through an executive order. Fourth, appellants argue that they are entitled to qualified immunity. We address each in turn.

A. Rule 65(a)(2)

The Federal Rules of Civil Procedure allow a court to consolidate a preliminary injunction hearing with a trial on the merits. *See* Fed. R. Civ. P. 65(a)(2). However, the court must provide the parties with " 'clear and unambiguous

notice' " of its intent to consolidate. *Univ. of Tex. v. Camenisch,* 451 U.S. 390, 395 (1981) (quoting *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972)). This notice must be given sufficiently early to allow the parties time to assemble and present their evidence. *Id.* However, any right to object to the court's timeliness in giving notice will be lost if a party does not object contemporaneously with the court's notice of consolidation. *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 913 (1st Cir.1989) (holding that appellant waived its right to complain when the court announced its intention to consolidate during the second day of a preliminary injunction hearing and appellant failed to object).

Here, the record is clear. The district court signaled the possibility that it might consolidate the preliminary injunction hearing with a trial on the merits in its order dated October 16, 2001. While this first notice is arguably ambiguous, we need not stop there. At the end of the hearing, the court announced, unambiguously, that it would consolidate under Rule 65. Appellants failed to object at either juncture, consequently waiving their right to raise this issue now. Therefore, we proceed to the merits of the case.

B. The Merits

After the consolidated trial on the merits, the district court granted a permanent injunction forbidding appellants from "holding investigative hearings without affording individuals under investigation substantial opportunity to defend, among other rights, the right to present testimonial and documentary evidence on their behalf and to confront and cross-examine witnesses." *Aponte,* 176 F. Supp.2d at 165.

Appellants contest the district court's decision, and we agree that the district court erred in concluding that these actions provide a basis for the issuance of the injunction.

Generally, we review a grant of a permanent injunction for abuse of discretion, *A.W. Chesterton Co. v. Chesterton,* 128 F.3d 1, 5 (1st Cir. 1997), but we always review questions of law *de novo. Arecibo Cmty. Health Care, Inc. v. Puerto Rico,* 270 F.3d 17, 22 (1st Cir. 2001). We review factual findings for clear error. *See Water Keepers Alliance v. United States Dep't of Def.,* 271 F.3d 21, 30 (1st Cir. 2001) (applying clearly erroneous standard to review of factual findings).

In order to grant a permanent injunction, the court must find four elements: (1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury without an injunction; (3) the harm to plaintiffs would exceed the harm to defendants from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction. *United States v. Mass. Water Res. Auth.,* 256 F.3d 36, 51 n.15 (1st Cir. 2001). While appellants challenge the district court's determination on all four prongs, we find the first dispositive and, therefore, decline to address the others.

Here, the district court found that appellees prevailed on the merits of their procedural due process claim. *Aponte,* 176 F. Supp.2d at 155-63. A threshold requirement for a successful procedural due process claim is to demonstrate the implication of a constitutionally protected interest in life, liberty, or property. *Romero-Barceló v. Hernández-Agosto,* 75 F.3d 23, 32 (1st Cir. 1996).

Appendix A

Appellees argue that two separate liberty or property interests trigger due process protections in this case. First, they assert a right to be free from criminal investigation and prosecution. Second, they maintain that the Puerto Rican Constitution establishes a protected liberty interest in reputation. We address each of these arguments in turn.

1. Interest in being free from criminal investigation and prosecution

The district court concluded that appellees "have a fundamental, constitutionally protected liberty interest in being free from investigation and prosecution for criminal offenses in a manner that tramples upon the procedural protections afforded by the Fourteenth Amendment." *Aponte,* 176 F. Supp. 2d at 156. To support this conclusion, the court looked to *Jenkins v. McKeithen,* 395 U.S. 411 (1969), which it determined governs this case. *Aponte,* 176 F.Supp.2d at 160. We disagree and hold that appellees have asserted no constitutionally protected interest because there has been no adjudication of criminal liability or of appellees' legal rights.

In *Jenkins,* a plurality of the Supreme Court held that the subject of a public investigation carried out by the Labor-Management Commission of Inquiry ("Louisiana Commission") stated a valid due process claim when he challenged the procedures of the Louisiana Commission. 395 U.S. at 431. A key finding on which the plurality relied is that the Louisiana Commission was "empowered to be used and allegedly [was] used to find named individuals guilty of violating the criminal laws." *Id.* at 428. Therefore, the Louisiana Commission "exercise[d] a function very much

akin to making an official adjudication of criminal culpability." *Id.* at 427. This finding distinguishes *Jenkins* from the earlier case of *Hannah v. Larche,* 363 U.S. 420 (1960).

Hannah addressed whether due process rights were implicated by public investigations of the Civil Rights Commission. This commission had been charged by Congress with investigating allegations of voting deprivations. *Id.* at 421-23. Several citizens, called as witnesses by the commission, filed suit to enjoin the investigation, alleging infringements of their due process rights.[5] *Id.* at 423-30. The Court began by noting that the Civil Rights Commission "does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. . . . Nor does it indict, punish, or impose any legal sanctions." *Id.* at 441. The Court then continued to explain that when there is no adjudication of legal rights, the due process clause is not implicated to the same degree:

> [W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a *general fact-finding*

5. Specifically, the plaintiffs wanted to know on what charges they were being investigated and on the basis of whose complaint. *Id.* at 441-42. Plaintiffs also argued that they had the right to cross-examine the complainants and other adverse witnesses. *Id.*

> *investigation* is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Id. at 442 (emphasis added). The Court also looked, quite specifically, at the use of other investigative bodies in our government. It found a long history of fact-finding investigations that used procedures similar to those employed by the Civil Rights Commission. *Id.* at 443-52. To stress this point, the Court went so far as to append an extensive list of various administrative agencies which conduct investigations without trial-like rights attaching. *Id.* at 454-92. Because the Court found that the Civil Rights Commission was more like an investigative agency, it held that the plaintiffs' due process rights had not been violated.

The Court has steadfastly maintained this distinction between general fact-finding investigations and adjudications of legal rights. It is precisely on this point that *Jenkins* turns. There, the Court distinguished the Louisiana Commission from the Civil Rights Commission by saying:

> We are not presented with a case in which any injury to appellant is merely a collateral consequence of the actions of an investigatory body. Rather, it is alleged that the very purpose of the [Louisiana] Commission is *to find persons guilty* of violating criminal laws without trial or procedural safeguards, and to publicize those findings.

395 U.S. at 424 (emphasis added). The Court noted that the Louisiana Commission was both required to make probable cause findings and able to file charges against individuals. *Id.* at 416-17. Furthermore, the Louisiana Commission was "concerned only with exposing violations of criminal laws by specific individuals." *Id.* at 427. These specific characteristics of the commission made it more like an adjudicatory body than an investigatory body. Therefore, due process rights attached.

In contrast, it is clear that investigations conducted by administrative agencies, even when they may lead to criminal prosecutions, do not trigger due process rights. In *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984), the Court considered a challenge to a private SEC investigation.[6] The plaintiffs challenged the ability of the SEC to issue third-party subpoenas without informing the parties under investigation. The Court, once again, looked to the difference between adjudication and investigation: "the Due Process Clause . . . is [not] offended when a federal administrative agency, without notifying a person under investigation, uses its subpoena power to gather evidence adverse to him. The Due Process Clause is not implicated under such circumstances because an administrative investigation adjudicates no legal rights." *Id.* at 742. The key distinction is that the SEC investigated whether violations of various

6. Because the SEC conducted a private investigation, *Jerry T. O'Brien* bears a close resemblance to this case, where the Commission's investigations are conducted confidentially. However, the parallel is not complete. In *Jerry T. O'Brien*, it is unclear whether the SEC had the power to make the results of its investigation public. Here, the Commission's findings have been made public by Governor Calderón.

securities laws may have occurred, not whether plaintiffs should be held legally responsible for any such violations. For plaintiffs to be held legally responsible, they would have to be found guilty after a formal adjudication, during which full due process rights would attach.

To the extent that the district court found that appellees have a constitutionally protected interest in being free from *investigation,* the court erred as a matter of law. The foregoing discussion shows that investigations, alone, do not trigger due process rights. There must also be an adjudication. Without an adjudication of legal rights, *Hannah* and *Jerry T. O'Brien* are clear: the Due Process Clause does not require that "the full panoply of judicial procedures be used." *Hannah,* 363 U.S. at 442.

However, it is not clear whether the district court also found that there was an adjudication of appellees' legal rights. *Aponte,* 176 F. Supp. 2d at 156 (stating that appellees have an interest in being free from both investigation and prosecution). We know that the Blue Ribbon Commission investigates government transactions in private, and, thereafter, makes a variety of recommendations. Included within those recommendations may be the suggestion that criminal, civil, or administrative actions be brought against certain individuals. In both the Barbosa and PRIME Reports, the Commission recommended that further actions be taken against appellees. The question, then, is whether the Commission has adjudicated appellees' legal rights in making these recommendations.

The question of whether there has been an adjudication does not turn on the language of the Order or the Commission's self-described role. Rather, it is a functional question. *See Cooper v. Salazar,* 196 F.3d 809, 815 (7th Cir. 1999) (holding that administrative investigation into alleged civil rights violations which resulted in determination of whether there was "substantial evidence" on which to proceed was a functional adjudication because, in event of negative determination, claimant could only appeal denial of claim to state supreme court). If any action of the Commission alters the appellees' legal rights, then there has been an adjudication. *Hannah,* 363 U.S. at 441; *Cooper,* 196 F.3d at 815.

Without making an explicit finding, the district court suggests that the Commission conducts adjudications because it "makes actual findings that named individuals are guilty of criminal violations as part of a process of criminal prosecution." *Aponte,* 176 F.Supp.2d at 161. However, the court's findings as to the subsidiary facts belies the conclusion. *See Alfaro De Quevedo v. De Jesús Schuck,* 556 F.2d 591, 593 (1st Cir. 1977) (finding that factual findings which are internally inconsistent are clearly erroneous). Additionally, our independent review of the Barbosa and PRIME Reports shows that the district court's conclusion is clearly erroneous.[7] *See* Fed. R. Civ. P. 52(a) (establishing that factual findings "shall not be set aside

7. The district court's conclusion could be characterized as either a factual finding or a mixed question of fact and law. Since the finding is clearly erroneous, it does not matter how we characterize it. Therefore, we decline to decide this issue.

unless clearly erroneous"); *see also Water Keepers Alliance,* 271 F.2d at 30 (applying clearly erroneous standard in review of preliminary injunction denial).

When the district court referred to the "actual findings" of criminal conduct, *Aponte,* 176 F. Supp. 2d at 161, it was apparently referencing the probable cause determinations that the court found in the Barbosa and PRIME Reports.[8] *See id.* at 144 ("probable cause to believe that violations of Puerto Rico criminal law have occurred"). However, a close reading of the district court's factual findings shows that the Commission does not make binding probable cause determinations. Rather, the Commission simply recommends that individuals be investigated further. The district court, itself, said that the Commission only makes "accusations of criminal misconduct." *Id.* at 148. Throughout its discussion, the district court said that the Barbosa and PRIME Reports "accuse" appellees of crimes and that appellees "are at risk of prosecution." *See, e.g., id.* at 157. Furthermore, it also recognized that appellees have not yet been indicted. *See id.* at 156 (noting that appellees "have not yet been formally charged"). Finally, the district court observed that, "the reports issued by the Blue Ribbon Commission are not obligatory, and the Commission can only offer recommendations that [Governor] Calderón refer a particular matter to the Department of Justice for prosecution." *Id.* at 160. Therefore, it is unclear how the court concludes that "[t]he Commission makes actual findings that named

8. We assume, *arguendo,* that determining probable cause could be an adjudication sufficient to trigger the due process clause. It is unnecessary to decide that question here because it is clear that the Commission does not even make probable cause determinations.

individuals are guilty of criminal violations as part of a process of criminal prosecution." *Id.* at 161. In fact, this finding is internally inconsistent with the numerous findings that the reports only accuse appellees of criminal conduct and that the Commission's recommendations are neither binding nor work as a formal indictment or charge against appellees.

The district court opinion is unclear on whether the Barbosa or PRIME Reports actually accuse appellees of specific crimes. *See, e.g., id.* at 157 ("The Commission concluded that [appellee] Pagán had committed undue intervention in the performance of contracts, bidding procedures or government operations in violation of Section 4353a of the Penal Code. . . ."). Therefore, we conducted an independent review of the evidence. We conclude that the reports do accuse appellees of misconduct. For example, the Barbosa Report finds, "at the very least [appellees] were grossly negligent." The PRIME Report says appellee Pagán "improperly intervened" in the bidding procedures and, in its most damning accusation, concludes that he "ordered the president of the bid board to cause the disappearance of the documents." However, the reports never make reference to any provisions of the Puerto Rican Penal Code. They never accuse appellees of specific criminal conduct. Furthermore, the reports are very clear that they only suggest referring the matters to various administrative departments for further investigation. There is no specific recommendation that either appellee be prosecuted, much less any finding of probable cause or actual institution of legal action against appellees. Therefore, the district court's conclusion that the reports make specific and binding determinations of criminal conduct

is clearly erroneous. *See United States v. Ortiz,* 177 F.3d 108, 109 (1st Cir. 1999) (holding that to the extent that a district court's findings are inconsistent with the uncontroverted evidence, they are clearly erroneous).

Additionally, the Order, By-Laws, and Guidelines are all explicit that the Commission is not given the power to adjudicate legal rights. The Commission cannot independently initiate or file any civil, criminal, or administrative charges. Rather, the Commission is only given the power to make recommendations to the Governor, who then makes her own determination about whether to pursue further investigations.

Therefore, we find that the Commission did not and cannot adjudicate the legal rights of appellees or any other individual. There is no adjudication, functional or otherwise. Accordingly, the Due Process Clause has not been triggered.

With this conclusion in mind, we would like to emphasize the district court's conclusion that appellees "have a constitutionally protected liberty interest in ensuring that the state acts in accordance with due process standards in the *prosecution* of [appellees]." *Aponte,* 176 F.Supp.2d at 158 (emphasis added). The fact that the district court failed to consider the difference between a prosecution and an investigation does not undercut this point. If appellees are ever prosecuted, they will be entitled to the full protections of the Due Process Clause, just like any other individual.

Appendix A

2. Interest in reputation

Appellees assert another interest, which they claim serves as a valid basis for their due process claim: a liberty interest in their reputations. However, *Paul v. Davis,* 424 U.S. 693, (1976), held that damage to one's reputation alone does not trigger the protections of the Due Process Clause. *Id.* at 701. Reputational harms must be attached to some other alteration in status in order to raise a valid due process claim. *Id.* at 711-12. Appellees claim to satisfy this requirement by invoking the Puerto Rican Constitution. While the Puerto Rican Constitution does include a specific protection for reputation, *see* P.R. Const. art. II, § 8, we conclude that the Puerto Rican courts have not afforded greater protections to reputation than stateside jurisdictions. Furthermore, there is no indication that appellees have lost any legal rights because of the alleged defamation by government actors. Since appellees can point to no alteration in their legal status attached to any reputational injury, we hold that appellees have not asserted a constitutionally protected interest in their reputations.

Paul is very clear. There must be a legal alteration in plaintiff's position before the courts will recognize a procedural due process claim:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by

> virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Paul, 424 U.S. at 710-11. The fact that a state accords protections to one's reputation by allowing one to bring a tort action does not create a legal status which is altered when the state is the alleged defamer. *Id.* at 711-12.

The question presented here is whether the fact that Puerto Rico enshrines protection for reputation in its constitution creates a legal status which is altered when the Puerto Rican government allegedly defames one of its citizens. While this issue has arisen before, we have never had to decide it. *See, e.g., Romero-Barceló*, 75 F.3d at 33.

Based on the Supreme Court's decision in *Paul*, we have consistently held that "the injury to reputation must be accompanied by a change in the injured person's status or rights (under substantive state or federal law)." *Beitzell v. Jeffrey*, 643 F.2d 870, 878 (1st Cir. 1981); *see also Brennan v. Hendrigan*, 888 F.2d 189, 195 (1st Cir. 1989) ("reputational injury must coincide with some other 'alteration of status' " (citing *Paul*, 424 U.S. at 709-10)). We have termed this a "defamation-plus" test. *Celia v. O'Malley*, 918 F.2d 1017, 1021 (1st Cir. 1990). One example of a successful "defamation-plus" claim is an allegation that a stigmatization has occurred in connection with a termination in employment. *See Brennan*, 888 F.2d at 196. Appellees have asserted nothing similar to this traditional "plus" factor.

Instead, they rely only on the assertion that Puerto Rico law creates a different regime. We have suggested that state law may broaden the liberty interests accorded due process protections. *See Silva v. Worden,* 130 F.3d 26, 33 (1st Cir. 1997) (noting that Massachusetts "may have a slightly broader conception of the liberty interests protected by due process"). Therefore, it is conceivable that Puerto Rican law could accord a protected liberty interest in reputation without appellees needing to allege an additional deprivation.

The Puerto Rico Supreme Court has made clear that Puerto Rico's Constitution provides sweeping human rights protections: "Our Constitution recognizes and grants some fundamental rights with a more global and protective vision than does the United States Constitution." *López Vives v. Police of P.R.,* 18 P.R. Offic. Trans. 264, 273 (1987). Furthermore, the Puerto Rico Constitution should be construed broadly in regard to these rights. *Id.* Despite these broad human rights protections, it does not necessarily follow that the Puerto Rican law protects reputation so broadly as to make it a protected liberty interest under the United States Constitution. To evaluate this question, it is necessary to look more closely at the protections Puerto Rico provides.

Puerto Rico law creates a right of action for defamation and libel in three separate sources. *See Giménez Alvarez v. Silén Maldonado,* 131 P.R. Dec. 91, 97-98 (1992). First, Article II, section 8 of the Puerto Rico Constitution provides, "Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life." This provision provides a right of action without enabling legislation. *Porto v. Bentley P.R.,*

Inc., 132 P.R. Dec. 331, 343 (1992). Second, the Libel and Slander Act of 1902 provides a right of action. 32 L.P.R.A. §§ 3141-49. This act draws from the common law tradition, *Porto*, 132 P.R. Dec. at 344 n. 8, and has been modified by pronouncements of the United States Supreme Court. *See id.* at 344-46. Third, there is a statutory right drawn from the Civil Code. 31 L.P.R.A. § 5141; *see also Giménez Alvarez*, 131 P.R. Dec. at 98.

In interpreting these various sources of law, the Puerto Rico Supreme Court has explicitly said that Puerto Rico law on libel and slander follows the common law tradition. *Villaneuva v. Hernández Class*, 28 P.R. Offic. Trans. 618, 128 P.R. Dec. 618, 646 ("Our libel and slander law — which follows the Anglo-Saxon common law. . . ."). Beyond this overt acknowledgment, the Puerto Rico courts frequently cite stateside jurisdictions when interpreting their laws protecting personal reputation. *See, e.g., Porto*, 132 P.R. Dec. at 349; *Villaneuva*, 128 P.R. Dec. at 647-48; *González Martínez v. López*, 18 P.R. Offic. Trans. 229, 236 (1987). Therefore, as currently developed by Puerto Rican courts, there is nothing that suggests that we should treat the protections accorded to reputation by Puerto Rico any more broadly than those granted in other United States jurisdictions.

Since the law in Puerto Rico appears to be no different, functionally, from the general common law protections for reputation, we cannot credit appellees' argument that reputation alone, in Puerto Rico, rises to a liberty interest accorded independent protection under the Due Process

Clause of the United States Constitution. Therefore, appellees have failed to demonstrate a protected liberty interest in their reputation.

3. Appropriateness of injunctive and declaratory relief

Based on the foregoing discussion, it is clear that appellees have failed to assert any protected interest in life, liberty, or property that would trigger the protections of the Due Process Clause. In holding otherwise, the district court erred. Consequently, the district court abused its discretion when it issued the permanent injunction.

The district court also entered a declaratory judgment that "the procedures employed by the Blue Ribbon Commission in the investigation of public corruption are fundamentally unfair and contravene the requisites of the due process clause of the Fourteenth Amendment." As this judgment was based on the finding that appellees succeeded on the merits of their due process claim, the district court also erred in awarding declaratory relief.

C. Absolute and Qualified Immunity

Because appellees' federal claims fail on the merits, we see no need to probe whether, or to what extent, the appellants may be immune from damages.

IV. Conclusion

Pursuant to the above discussion, we vacate the permanent injunction and reverse the declaratory judgment issued against defendants-appellants. Finally, we remand to the district court with instructions to enter judgment in favor of defendants-appellants on the due process claim and to dismiss the remaining state law claims.

Vacated, reversed and remanded.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 01-2705
01-2706

JORGE E. APONTE; DANIEL PAGAN,

Plaintiffs, Appellees,

v.

SILA MARÍA CALDERÓN; ADOLFO KRANS; CONJUGAL PARTNERSHIP, KRANS-CALDERÓN,

Defendants, Appellants,

DAVID NORIEGA-RODRÍGUEZ; ILEANA COLÓN-CARLO; CARMEN RITA VÉLEZ-BORRÁS; PEDRO GALARZA; PEDRO LÓPEZ-OLIVER; ANGEL HERMIDA.

Defendants, Appellants.

JUDGMENT
Entered: March 22, 2002

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Appendix A

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is vacated and reversed, and the matter is remanded for further proceedings consistent with the opinion issued this day.

By The Court:
Richard Cushing Donovan, Clerk

By: _____
Chief Deputy Clerk

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT OF PUERTO RICO DATED DECEMBER 11, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

Civil No. 01-1963 (JAF)

JORGE E. APONTE and his wife; DANIEL PAGAN, his wife, and the conjugal partnership constituted between them,

Plaintiffs,

v.

SILA M. CALDERON, in her personal and official capacity as Governor of Puerto Rico, her husband, Adolfo Krans, and the conjugal partnership constituted; between them; DAVID NORIEGA-RODRIGUEZ, in his personal and official capacity as President of the Independent Citizens' Commission to Evaluate Governmental Transactions, his wife, Jane Doe, and the conjugal partnership constituted between them; ILEANA COLON-CARLO, her husband John Doe, and the conjugal partnership constituted between them; CARMEN RITA VELEZ-BORRAS, her husband John Doe, and the conjugal partnership constituted between them; PEDRO GALARZA, his wife Jane Doe and the conjugal partnership constituted between them; PEDRO LOPEZ-OLIVER, his wife Jane Doe and the conjugal partnership constituted between them; ANGEL HERMIDA, his wife Jane Doe and the conjugal partnership constituted between them; all in their personal and official capacities as members of the above-mentioned Commission; UNKNOWN DEFENDANTS X, Y, and Z; INSURANCE COMPANIES A, B, and C,

Defendants.

Appendix B

OPINION AND ORDER

On November 29, 2001, this court issued an opinion and Order declaring that the procedures employed by the Blue Ribbon Commission violate the due process clause of the Fourteenth Amendment of the United States Constitution. *Docket Document No. 46.* We enjoined Defendants from holding investigative hearings without providing individuals under investigation substantial opportunity to present testimonial and documentary evidence on their behalf and to confront and cross-examine witnesses, as outlined in *Jenkins v. McKeithen*, 395 U.S. 411 (1969). *Id.* This court concluded that Defendants are not protected by the defense of qualified immunity. *Id.* The following day, Defendants filed notices of appeal. *Docket Document Nos. 48, 49.*

On December 4, 2001, Defendants filed a petition to stay or modify our injunction pending appeal. *Docket Document No. 50.* Defendants request that this court stay all further proceedings in this case pending resolution of the appeal. Specifically, Defendants ask that we suspend enforcement of the permanent injunction. Plaintiffs filed an opposition to Defendants' motion. *Docket Document No. 54.*

Motion for a Stay of the Injunction

"When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal." FED. R. CIV. P. 62 (c).

Appendix B

Upon a motion for a stay of an injunction, a court must weigh the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). This court concludes that none of these factors weighs in favor of granting a stay of the injunction.

Life, Liberty or Property Interest

Defendants contend that they are likely to succeed on the merits of their appeal because this court's November 29, 2001 Opinion and Order is purportedly premised on a novel theory of due process, whereby individuals have a "procedural due process interest in procedural due process." Defendants are apparently arguing that Plaintiffs do not have a constitutionally protected substantive liberty interest and, therefore, they may not invoke the protections of the due process clause. Defendants are mistaken.

Defendants misread our decision. In our November 29, 2001 ruling, this court opined that Plaintiffs have a fundamental, constitutionally protected liberty interest in being free from investigation and eventual prosecution for criminal infractions in a manner that tramples upon the due process clause of the Fourteenth Amendment.

On numerous occasions, the Supreme Court has elaborated on the procedural safeguards prescribed by the

due process clause to protect the rights of individuals subject to the punishments meted out through the criminal justice system. *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2. 7 (a) (2d ed. 1999) . From the investigatory stage through sentencing and appeal, the criminal adjudicatory process is permeated with due process requirements. *Id.*

Through the criminal justice system, the state has the authority to impose hefty punishments on persons found to have committed criminal violations. Since convicted persons may be sentenced to imprisonment or even death, individuals have a constitutionally protected liberty interest in ensuring that the state investigation and prosecution process are fundamentally fair; in other words, the state must comply with the requisites of the due process clause. *See id.*

Plaintiffs are facing lengthy sentences of imprisonment if they are ultimately convicted of the crimes the Blue Ribbon Commission has accused them of committing. The Commission operates under the guise of providing a mere evaluation or designation to the Governor, but it actually makes findings of probable cause as part of a process of prosecution. A sentence of imprisonment would obviously impose very great restrictions on Plaintiffs' basic freedoms. Plaintiffs plainly have a liberty interest in ensuring that the state's investigation and potential prosecution of them comports with due process.

This court is not of the view that procedural fairness is, in and of itself, an interest sufficient to implicate the due process clause. *See* Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF.

L. REV. 146, 184-87 (1983). A plaintiff can invoke the due process clause only if he has been deprived of some substantive liberty interest. Freedom from "procedural grossness" is not a constitutionally protected liberty interest. *Id.* Our view is that the Blue Ribbon Commission cannot operate a Star Chamber or inquisition to place a targeted person's head on a platter for the Secretary of Justice and her prosecutors to finish the victim off through a prosecution that has already been tainted.

Defendants have repeatedly cited to two cases, *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Olym v. Wakinekona*, 461 U.S. 238 (1983), for the proposition that Plaintiffs do not have a federal liberty interest in a particular procedural protection. However, these cases have no bearing on the present case.

In *Hewitt*, the plaintiff, Helms, was a state prisoner who had been confined to administrative segregation following the outbreak of a fierce prison riot. 459 U.S. at 462. He brought a lawsuit against the administrators of the state penitentiary, claiming that his confinement to administrative segregation violated his due process rights. *Id.* The *Hewitt* Court concluded that, pursuant to a Pennsylvania statute, Helms had a constitutionally protected liberty interest in remaining in the general prison population, but that the prison's procedures for confining inmates in more restrictive quarters were constitutional. *Id.* at 466.

In *Olim*, the Court addressed the issue of whether the transfer of a convicted rapist and murderer from a state prison in Hawaii to a correctional institution in California

deprived him of any constitutionally protected liberty interest. 461 U.S. at 240. Due to the prisoner's previous escapes, multiple convictions, and threats to preserve internal order and discipline and to maintain institutional security."). A person confined in a prison pursuant to a lawful conviction retains extremely limited liberty interests during his incarceration. In contrast, a free individual being investigated for misconduct as part of a process of criminal prosecution is protected by all of the procedural safeguards imposed by the due process clause.

Jenkins

Defendants reiterate their previous argument that *Jenkins v. McKeithen*, 395 U.S. 411 (1969), does not control the present case, but that this court should rely on *Hannah v. Larche*, 363 U.S. 420 (1960), instead. Defendants argue that since the Blue Ribbon Commission, unlike the Louisiana commission examined by the *Jenkins* Court, does not have the power to file criminal charges against individuals, this court should rest our decision on *Hannah*.

In *Jenkins*, the Louisiana commission possessed the authority to file formal charges if there existed probable cause to believe that a crime had occurred. 395 U.S. at 417. The Blue Ribbon Commission does not appear to have the faculty to file criminal charges against persons under investigation, such as Plaintiffs. Nevertheless, this court concludes that this factual distinction is inconsequential for purposes of our analysis. The Blue Ribbon Commission uses its substantial powers to gather evidence of criminal activity in a manner that is blatantly unfair to persons under

investigation. It then turns the evidence over to the Puerto Rico Department of Justice for further proceedings. For the local prosecutors, the Blue Ribbon Commission's delivery of these tools for conviction to them is like receiving a shiny Christmas present that has been wrapped in festive paper and adorned with a red bow. To an individual incarcerated following a conviction resulting from a Blue Ribbon Commission investigation, it would be completely irrelevant whether the formal act of filing charges had been performed by the Commission itself or by a prosecutor. The view from his prison cell would be the same, regardless.

Consolidation of the Preliminary Injunction Hearing with the Trial on the Merits

Defendants whine that they allegedly did not receive timely notice that this court was converting the preliminary injunction hearing into a trial on the merits. The record belies Defendants' frivolous complaint.

"Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application." FED. R. Civ. P. 65(a)(2). Before a court may combine the proceedings in this fashion, the parties must receive clear notice that "such consolidation is contemplated." *Caribbean Produce Exch., Inc. v. Sec'y of Health & Human Servs.*, 893 F.2d 3, 5 (1st Cir. 1989).

On October 16, 2001, this court issued an order pertaining to the hearing scheduled to commence on

November 6, 2001. *Docket Document No. 35.* We ordered the parties to proffer their evidentiary submissions at the hearing on a number of questions, including "What other evidence, aside from that properly submitted in a preliminary injunction hearing, do the parties expect that they would present if the case were to be tried on the merits?" *Id.* We specifically directed the parties' attention to FED. R. CIV. P. 65(a)(2). *Id.*

At the conclusion of the hearing on November 8, 2001, this court stated on the record:

> I do think on the limited issues we're trying here, which are the ones that have been discussed, and the possibility of declaratory [and] injunctive relief, these kinds of things, I think that there is no reason why I should not give a final adjudication. . . . Let's get it over with. Let's get it out of the way. That's exactly what I intend to do under Rule 65.

The parties received clear notice that this court was contemplating consolidation of the preliminary injunction hearing with the trial on the merits. *See Caribbean Produce*, 893 F.2d at 5. Defendants voiced no contemporaneous objection at that time. We dismiss Defendants' claim that our consolidation was improper.

Scope of the Injunction

Defendants asseverate that the permanent injunction issued by this court is over broad, because it protects

individuals who are not named parties to this suit. Defendants contend that Plaintiffs lack standing to request, and this court lacks authority to issue, an injunction prohibiting Defendants from infringing upon the procedural due process rights of non-parties in the course of the Blue Ribbon Commission's investigative hearings.

Injunctive relief is primarily directed to the protection of the moving parties.

> An injunction should be narrowly tailored to give only the relief to which plaintiffs are entitled. . . . . Of course, "[a]n injunction . . . is not necessarily made over broad by extending benefit or protection to persons other than prevailing parties in . . . [a] lawsuit — even if it is not a class action — if such breadth is necessary to give prevailing parties the relief to which they are entitled."

Brown v. Trs. of Boston Univ., 891 F.2d 337, 361 (1st Cir. 1990) (internal citations omitted).

Here, we find that an injunction running to the benefit of non-parties under investigation by the Blue Ribbon Commission is necessary to afford Plaintiffs the relief to which they are entitled. Plaintiff Pagán has already been summoned to testify before the Blue Ribbon Commission on more than one occasion. The Commission has issued two reports accusing him of serious crimes stemming from his purported mismanagement of public funds. Plaintiff Aponte, as the former Director of the Office of Management and Budget, is particularly vulnerable to being implicated

in further criminal investigations by the Blue Ribbon Commission because of his high profile, integral role in the approval of transactions undertaken by the Rosselló administration. Due to the peculiar secrecy surrounding the Commission's activities which we have previously deplored in our November 29, 2001 ruling, it is impossible for this court to ascertain whether the Blue Ribbon Commission will continue to collect evidence from witnesses to accuse Plaintiffs of further criminal misdeeds. We simply do not know what other machinations are in the works at the Red Palace annex to La Fortaleza. The Blue Ribbon Commission may very well be contemplating further criminal investigations implicating Plaintiffs, along with other persons. For these reasons, we conclude that it is necessary to enjoin the Blue Ribbon Commission from conducting hearings with persons under investigation without affording such individuals the opportunity to confront and cross-examine witnesses, and to proffer testimonial and documentary evidence on their behalf. Our injunction applies with equal force to Blue Ribbon Commission interviews of both Plaintiffs and non-parties.

We note that even in the absence of any injunction, it would be indecorous for the Blue Ribbon Commission to continue to conduct investigations in the same unconstitutional manner as it did previously, in light of our declaratory judgment. A declaratory judgment has the force and effect of a final judgment with res judicata implications. Noncompliance would clearly be inappropriate and dishonorable. *See Rivera Puig v. Garcia Rosario*, 785 F.Supp. 278, 293 (D.P.R. 1992).

Appendix B

Alleged Injury to Defendants and the Public

Defendants asseverate that, if this court refuses to stay the injunction pending appeal, both they and the public will suffer irreparable injury. Specifically, Defendants fret that the production of confidential exhibits to Plaintiffs will have a chilling effect on the Blue Ribbon Commission's ability to procure information from anonymous sources. Defendants contend that "a refusal to issue a stay of the injunction will interfere with the Commission's future evaluations and with the Governor's ability to fulfill her core constitutional obligations in the manner she legitimately deems appropriate." *Docket Document No. 50.*

Defendants lack a basic understanding of the import of our November 29, 2001 Opinion and Order. This court ruled that the investigative procedures applied by the Blue Ribbon Commission violate the fundamental due process rights of Plaintiffs. We explained in great length that the Commission had conducted its investigations of Plaintiffs in an unconstitutional manner. The practices employed by the commission are unacceptable. Since the Commission's procedures are unconstitutional, Defendant Calderon cannot "legitimately deem [the continuance of such practices to be] appropriate." Though she serves as the chief executive of the Commonwealth of Puerto Rico, Defendant Calderón is not exempt from having to comply with the strictures of the United States Constitution. Defendant Calderón may no longer abuse the procedural rights of individuals, because the Constitution precludes her from doing so.

Appendix B

Defendants complain that this court's issuance of a permanent injunction hampers the Blue Ribbon Commission's ability to proceed with its investigations in the same unconstitutional manner as it did previously. That is precisely the purpose of our ruling. Since the Blue Ribbon Commission has operated in a manner that is grossly unfair, Defendants must implement fundamental changes to the Commission's practices if it is to continue in existence.

Defendants gripe that compliance with the injunction would require the Blue Ribbon Commission to disclose its investigative hearings to the public, in violation of the Commission's regulations, which require confidentiality. This court has already expressed its view that the secrecy surrounding the Commission's operations only breeds suspicion that Defendants are committing wrongdoing behind closed doors. Our concern is the protection of individuals' constitutional right to due process, not any potential deviation from the unconstitutional procedural regulations adopted by the Blue Ribbon Commission.

We affirm our opinion that the public interest would not be harmed in any way from the imposition of an injunction against Defendants. There are already numerous existing government agencies, such as the Comptroller's Office, the Government Ethics Office, the Department of Justice, the Special Independent Prosecutor's Office, the Office of Management and Budget, and the Legislative Assembly, which are engaged in the investigation of corruption and the promotion of the efficient use of public funds. Nothing prevents Defendants from using traditional, lawful methods to investigate and prosecute corruption through one or more

of the other government institutions dedicated to that purpose. The issuance of a stay of the injunction would permit Defendants to continue abusing individuals' constitutional rights, thereby causing substantial detriment to the public.

Conclusion

This court DENIES Defendants' request for a stay of our permanent injunction. We will await resolution of Defendants' appeals by the First Circuit before proceeding with the disposition of the remaining triable issues.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 11th day of December, 2001.

s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO WITH ADDENDUMS A AND B DATED NOVEMBER 29, 2001

JORGE E. APONTE and his wife; DANIEL PAGAN, his wife, and the conjugal partnership constituted between them,

Plaintiffs,

v.

SILA M. CALDERON, in her personal and official capacity as Governor of Puerto Rico, her husband, Adolfo Krans, and the conjugal partnership constituted between them; DAVID NORIEGA-RODRIGUEZ, in his personal and official capacity as President of the Independent Citizens' Commission to Evaluate Governmental Transactions, his wife, Jane Doe, and the conjugal partnership constituted between them; ILEANA COLON-CARLO, her husband John Doe, and the conjugal partnership constituted between them; CARMEN RITA VELEZ-BORRAS, her husband John Doe, and the conjugal partnership constituted between them; PEDRO GALARZA, his wife Jane Doe and the conjugal partnership constituted between them; PEDRO LOPEZ-OLIVER, his wife Jane Doe and the conjugal partnership constituted between them; ANGEL HERMIDA, his wife Jane Doe and the conjugal partnership constituted between them; all in their personal and official capacities as members of the above-mentioned Commission; UNKNOWN DEFENDANTS X, Y, and Z; INSURANCE COMPANIES A, B, and C,

Defendants.

Appendix C

OPINION AND ORDER

I.

Introduction

This is an action for a declaratory judgment, injunctive relief, and damages, in which Plaintiffs seek redress for the purported violation by Defendants of their constitutional rights to freedom of speech and association, to the equal protection of the laws, and to due process of law, as guaranteed by the First, Fifth, and Fourteenth Amendments to the United States Constitution. U.S. CONST. amends. I, V, XIV. The complaint is brought under the provisions of 42 U.S.C. § 1983 (1988 & Supp. I 2000).[1] Jurisdiction is invoked under 28 U.S.C. §§ 1331 and 1343 (1993).

Plaintiffs challenge the constitutionality of the Independent Citizens' Commission to Evaluate Government Transactions, popularly known as the Blue Ribbon Commission,

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1. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

created by Defendant Governor Sila M. Calderón, of the Commonwealth of Puerto Rico, through Executive Order No. 2001-06.

Prior to the November 2000 general election, Sila M. Calderón, as gubernatorial candidate for the Popular Democratic Party, publicly accused the administration of the New Progressive Party in power from 1992 to 2000 with wide-ranging public corruption.[2] The Popular Democratic Party supports maintenance of the current political status of Puerto Rico in relation to the United States. *See* 48 U.S.C. §§ 731-914 (1982 & Supp. I 2001). The New Progressive Party advocates for Puerto Rico to become a state. As part of the political platform of the Popular Democratic Party, then-candidate Calderón promised to create a Blue Ribbon Commission to investigate corruption committed by public officials under the New Progressive Party administration.

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2. In the government program proposed by Defendant Calderón during her campaign, she suggested the creation of a Blue Ribbon Commission "that will examine the major or more controversial transactions carried out by the present government." *Pls.' Exh. 21.* At the injunction and declaratory judgment hearing on November 8, 2001, Defendant Calderón testified that she had been referring to the New Progressive Party administration of Governor Rosselló that had been in power at the time. In the government plan titled "Frontal Attack on Corruption and Certain Punishment for the Corrupt" published on the website of La Fortaleza, the Governor's Office, Defendant Calderón deplored the fact that "[t]he ongoing public spectacle of rampant corruption which has been exhibited by the present Administration has embarrassed the people of Puerto Rico and outraged our citizenry." *Pls.' Exh. 22.* Defendant Calderón was again referring to the Rosselló administration.

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Plaintiffs Jorge E. Aponte and Daniel Pagán were high-ranking officials in the targeted New Progressive Party administration. Plaintiff Aponte, a certified public accountant ("CPA"), was the Director of the Office of Management and Budget of the Commonwealth of Puerto Rico during the years 1993 to 2000. Plaintiff Pagán, an engineer, was the outgoing Secretary of the Puerto Rico Department of Natural and Environmental Resources (known by its Spanish acronym, "DRNA"). Both officials responded directly to the New Progressive Party Governor, Dr. Pedro Rosselló, and they held their public positions until December 31, 2000.

Defendants are Governor Sila M. Calderón and the members of the Blue Ribbon Commission. The members of the Blue Ribbon Commission all sympathize with the present Popular Democratic Party administration and its quest to investigate the preceding administration. At the November 6-8, 2001 hearing held before this court, none admitted their specific political party affiliation, and all appear to be supporters of political ideologies other than that of the New Progressive Party or so-called independent voters.

II.

The Creation of the Blue Ribbon Commission

The moving force behind the formation of the Blue Ribbon Commission is Governor Sila M. Calderón's political promise to investigate public corruption by officers of the outgoing New Progressive Party administration. Prior to the promulgation of Executive Order 2001-06, Defendant Calderón requested the persons she had selected to be members of the Commission to conduct research regarding

the constitutionality of the body she intended to create. With the exception of one Defendant, who is a CPA, all of the past and current members of the Commission hold law degrees. Three Defendants are former judges. The Commissioners performed extensive research on the constitutionality of the Commission and its precise purposes prior to Defendant Calderón's declaration of Executive Order 2001-06.[3]

The enabling executive order cites unprecedented corruption in public management, which, according to its terms, requires total eradication to reestablish the trust of the citizens of Puerto Rico in government institutions. The executive order seeks the cooperation of all public employees and the entire citizenry in the fight against public corruption and conceives the independent commission composed of private citizens to be representative of society. The commission is given power to:

> FIRST: . . . evaluat[e] significant government transactions, both of the past and present administrations, which in the judgment of the Commission itself, warrant evaluation.
>
> SECOND: . . . (a) evaluate significant government transactions conducted by agencies of the Executive Branch of the government of the Commonwealth of Puerto Rico, both during the

3. The record does not include any published legal opinion or official document by the Commissioners regarding the constitutionality of the Blue Ribbon Commission, nor is the court aware that any such document exists.

past and present administrations, which in the judgment of the Commission itself warrant evaluation. . . . Those transactions shall be considered significant which, in the Commission's judgment, whether because of the amount involved therein or because of other characteristics, have the potential of substantially impacting on areas such as the government structure, the public treasury, the country's economy and infrastructure, or the citizenry's trust in government institutions.

(b) . . . request from any natural or artificial person, whether or not a public functionary or employee, every sort of information regarding any government transaction which is under evaluation by the Commission, when in the judgment of the Commission itself, that information is pertinent to the evaluation process.

(c) . . . require the assistance of functionaries belonging to the Executive Branch in order to obtain, through the mechanisms provided by law, the appearance of any person or the delivery of any document or object, whensoever this shall be necessary and warranted.

THIRD: . . . issue to the Governor such reports as the Commission itself deems appropriate, with the partial or final results of the evaluations which the Commission has carried out or is carrying out. Said reports shall include such findings as have

resulted from those evaluations, and may also include recommendations, both short- and long-term, that such actions as the Commission deems advisable be taken, including, but not limited to, recommendations that new statutory or regulatory rules be adopted to govern such transactions or that existing ones be modified, *or that administrative, civil or criminal procedure be undertaken against certain persons.* Such reports shall be disclosed solely by the Governor, except when in her judgment this may interfere with the successful carrying out of such actions as may be necessary in light of the contents of the report in particular.

FOURTH: The Governor's Office shall provide the Commission with an office where it may perform its functions. The Commission's administrative operations shall be carried out through the Department of State. The Department of State, *the Department of Justice,* and the other government agencies under the authority of the Governor's Office, are authorized and ordered to provide the Commission with such support as is necessary to enable the Commission to successfully carry out its mission, including, but not limited to, technical support, support, of personnel equipment [sic], and the hiring by the agency of such additional staff as the Commission may need. Requests for support from the Commission shall be channeled through the Chief of Staff.

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. . . .

> SIXTH: . . . make its decisions by a majority of the total number of its members. . . . The work of the Commission shall be carried out in strict confidentiality. The information to which the members of the Commission have access as a result of their functions on the Commission shall be deemed strictly privileged, and may not be revealed for use by any of them for any purpose other than the work of the Commission. Subject to the provisions of this Executive Order, the Commission may adopt such other rules as it deems appropriate to govern its own internal functioning.
>
> SEVENTH: The chairperson of the Commission shall organize and direct the work of the Commission, and shall be its only spokesperson. He or she may carry out any other activity which is entrusted to him or her by the Governor or by the Committee [sic] which is necessary to better fulfill this Executive Order.

Docket Document No. 7, Exh. 1 (emphasis added).

The Commission is composed of five members appointed by the Governor. David Noriega-Rodríguez, an attorney-at-law, former legislator, and advocate for the Puerto Rico independence movement, acts as chairperson. Ileana Colón-Carlo, a CPA, an attorney-at-law, and former Comptroller of Puerto Rico, along with Carmen Rita Vélez-Borrás,

an attorney, former Secretary of Justice for the Commonwealth, and former Superior Court Judge, are members of the Commission. Both claim to be politically independent. Ms. Colón-Carlo, however, was appointed Comptroller by Governor Rafael Hernández Colón and actively participated in Governor Calderón's campaign. CPA Pedro Galarza, a former president of the Puerto Rico Telephone Company under a previous Popular Democratic Party administration, was a member who recently resigned from the Commission for personal reasons. His position has not been filled. Attorney Pedro López-Oliver, a retired Superior Court Judge, formed part of the Commission until late June 2001. He resigned from the Commission, and has been substituted by former Superior Court Judge Angel Hermida, who also claims to be an independent voter. The members of the Commission serve at the pleasure of the Governor and can be removed by Defendant Calderón at any time. The Commissioners receive compensation for their efforts through professional services contracts with the Governor's Office.

The Commission is empowered to act *sua sponte,* but nothing in Executive Order No. 2001-06 impedes the Commission from acting on a referral basis, whether from private or public sources.

Upon the Commission's decision to investigate a particular governmental transaction, its members proceed by private, confidential, and strictly privileged hearings to ascertain the facts pertaining to alleged violations of governmental policy, irrespective of whether the consequences for the persons under investigation are civil

or criminal in nature. To carry out this function, the Commission has the power to make appropriate rules and regulations, to employ attorneys, investigators, and other staff members, to compel the attendance of witnesses with the assistance of the agencies of the executive branch of government, to examine them under oath, and to require the production of books, records, and other evidence. *See Docket Document No. 7, Exh. 1.* Since the entire machinery of the executive branch is at its disposal, the Commission can technically enforce its orders seeking attendance of witnesses or production of books, records, and other evidence by petition to the state courts for contempt proceedings. *Id.* Although the Commission has the power to request the aid of other executive branch agencies to compel the testimony of a particular witness or the disclosure of documentary evidence, the Commission claims that it has never done so because the Commissioners decided informally that they would not avail themselves of this power bestowed upon them. We note that the internal determination by the Commissioners that they would not compel a witness to testify through service of a subpoena had not been previously divulged to the public, and we have seen no contemporaneous amendment to the executive order or to any of the Commission's regulations to that effect.

On paper, the scope of the Commission's investigative authority is not explicitly limited by the enabling executive order to violations of criminal laws. However, the Commission's involvement in probing criminal violations is patently clear from the executive order and is reinforced by the availability through that order of the executive branch's investigatory resources, including the Department of Justice of Puerto Rico, to assist the Commission in its activities.

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Since its creation, the Commission has rendered reports in three distinct transactions, two of which are the object of this suit. The transactions are, first, the lease and purchase of a building located at Barbosa Avenue 306 and an adjacent parking lot on Italia Street, Hato Rey, Puerto Rico. The second pertains to the relationship between the Department of Natural and Environmental Resources and the Solid Waste Authority and a corporate entity known as the Puerto Rico Infrastructure Management Group, Inc. ("PRIME"). In both cases, the Commission has submitted reports to the Governor. The findings have been private in nature, following the tenor of Executive Order No. 2001-06. However, the reports have been the object of news conferences presided over by Governor Calderón and some members of the Blue Ribbon Commission, and copies of the reports have been made available to the press for publication. In both instances at issue here, these press conferences and the publicized reports find that there is probable cause to believe that violations of Puerto Rico criminal law have occurred. The findings of the Commission in these two cases are a matter of public record, not because the enabling executive order provides such a mechanism, but because the findings of the Commission have been made available to the general public in the manner outlined above.

The Commission and the Governor have also reported the findings to the Puerto Rico Department of Justice and have referred the matters to them for further proceedings. In certain instances, the Commission obtained information relating to criminal activity and immediately forwarded such evidence to the Governor. The Governor then referred the information to the Department of Justice for further action,

even before the issuance of the Commission's report to the Governor and the publication of such report through press conferences.

The Blue Ribbon Commission approved a set of operational by-laws during its regular meetings held on February 20 and March 13, 2001. During the hearing held by this court on November 6-8, 2001, we heard testimony that a second set of by-laws that had been deemed strictly confidential had also been approved on February 27 and March 27, 2001. Surprisingly, these regulations have not been considered for official publication in accordance with Puerto Rico's Uniform Administrative Procedure Act. *See* 3 L.P.R.A. §§ 2101-2201 (1992 & Supp. I 1998). These norms for investigation and preparation of reports cover topics such as the solicitation of assistance from the executive branch to compel the attendance of witnesses and the production of documents, the issuance of summonses, directives as to the course of action to take when an attending witness refuses to testify or produce documents, the manner in which interviews are to be conducted and sworn statements are to be taken, the procedure for interviewing witnesses suspected of having committed violations of criminal laws, and norms of confidentiality. The salient aspects of this confidential set of rules are quite revealing. Witnesses are forbidden from taking notes, and they cannot record their testimony. The Commission is directed not to provide copies of the statements made by witnesses upon their request. The hearing officer or person in charge of the investigation may seek the presence of a prosecuting attorney or other representative of the Department of Justice during any interview when such presence would advance the purposes of the interview.

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There is no required method of recording the proceedings. Interviews or interrogations can be recorded or taken by a court reporter or simply reduced to writing by the examining officer as the witness testifies. *See Addendum "A" to this Opinion and Order.*

As indicated above, the Commission has the power to compel the attendance of witnesses. A witness is only given limited notice of the subject matter of the investigation before being asked to appear and testify. The witness may be allowed to bring an attorney to the interview. The Commission, however, limits the participation of the attorney. Counsel may not question his client as to any relevant matter. The witness and his counsel have no right to examine other witnesses. The Commission does not recognize the right to cross-examine witnesses. The procedure is such that the witness or his attorney may not even submit to the Commission proposed questions to be asked of any other witness appearing before it, inasmuch as the Commission has sole authority to decide what to ask and what must be produced.

The executive order that creates the Commission does not provide a person who might be incriminated or defamed as a result of the publication of the Commission's report an opportunity to further appear and be heard, or to call a reasonable number of witnesses on his behalf. The Commission employs a staff to conduct investigations of past government transactions. The Commission's investigative staff includes: Attorney and former Special Independent Prosecutor Brenda León-Suárez, executive director of the Commission; attorney José Sagardía; attorney Gilberto Vilá-Pérez; CPA Luis E. Gutiérrez; and attorney

Nilsa García. These investigators conduct hearings, at which they receive testimony from witnesses. León-Suárez provides periodic progress reports regarding the status of ongoing investigations to the Commissioners. The Commissioners analyze the sworn statements, documentary evidence, and notes on interviews of witnesses collected by the investigative staff, and León-Suárez, in conjunction with the other investigators, prepares a draft of the factual findings that will serve as the basis for the Commission's report to the Governor. The Commissioners then discuss the findings and draft the conclusions and recommendations portions of the report.

In addition to the factual findings, conclusions, and recommendations contained in the main body of the report, the Governor also receives the report's exhibits, which consist of letters, contracts, electronic mail print-outs, notes of interviews, and sworn statements obtained by the Commission. After the report is submitted to the Governor, the Commissioners discuss their findings with her prior to the holding of a press conference.

III.

The Blue Ribbon Commission's Investigation of Plaintiffs

A. *Plaintiff Jorge E. Aponte*

On March 21, 2001, an armed agent of the Special Independent Prosecutor's Office, along with a Treasury Department agent, delivered a summons to the home of

Plaintiff Aponte. *Pls.' Exh. 18.* The summons requested Plaintiff Aponte's appearance at a hearing scheduled for the afternoon of March 29, 2001. The document did not indicate the specific subject matter of the hearing.

Plaintiff Aponte appeared at the Commission's office in the Red Palace building annexed to La Fortaleza, the Governor's mansion, in San Juan, at the designated time. He hand-delivered a letter to León-Suárez, requesting the following: A copy of Executive Order No. 2001-06; a copy of the Commission's bylaws; the specific topic to be discussed at the hearing; a copy of any opinion by the Puerto Rico Secretary of Justice explicating the legal basis for the Commission to be able to compel witnesses to appear before it, if any such opinion existed; and information regarding the appointment of counsel to assist him in these proceedings. León-Suárez informed Plaintiff Aponte that she would forward his requests to the Commissioners, but she was certain that he was not entitled to appointment of counsel in connection with the Commission's investigation.

León-Suárez submitted a written response dated April 11, 2001, to which she attached a copy of Executive Order 2001-06 and the Commission's bylaws, as requested by Plaintiff Aponte.[4] León-Suárez informed Plaintiff Aponte that the Commission was interested in his testimony in relation to the purchase of the 306 Barbosa Avenue building

4. León-Suárez only provided Plaintiff Aponte with a copy of the first set of operational bylaws approved by the Commission, not the second set of procedural bylaws that governed the procedure for collecting information from witnesses that remained strictly confidential until it surfaced at the hearing held by this court.

and the contiguous lot at 307 Italia Street. The letter summoned Plaintiff Aponte to appear at a hearing scheduled for April 19, 2001.

Plaintiff Aponte attended the hearing in part because León-Suárez had assured him that his role in the proceedings was only to testify to the validity or authenticity of certain documents. Plaintiff Aponte was not aware that the Commission was investigating him for misconduct. He believed that if he refused to appear, the Commission would conclude that he was hiding something. Plaintiff Aponte had reviewed the executive order and bylaws of the Commission which he had been provided, and he had determined that if he did not appear before the Commission as required pursuant to said documents, he would have been forced to appear under compulsion of legal process.

On April 19, 2001, Commission investigators León-Suárez, Sagardía, Gutiérrez, and Vilá-Pérez interviewed Plaintiff Aponte. Plaintiff Aponte informed the investigators that he believed the Commission was unconstitutional. He asked to record or take notes of the hearing, but León-Suárez refused those requests. When the investigators began to take notes of the proceedings, Plaintiff Aponte asked for a copy of their notes, but his request was denied. León-Suárez asked Plaintiff Aponte if he was willing to have a stenographer record the hearing. Since Plaintiff Aponte could not verify whether the stenographer's record would be accurate and considering that he did not have the assistance of an attorney, he declined.

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During the hearing, Plaintiff Aponte was not advised of any constitutional rights that may have applied to him. The Commission's investigators questioned him regarding the Barbosa 306 transaction. The investigators' report of interview forms part of Court Exhibit 4-3. Court Exhibits 4 and 8 are photocopies made by the court of additional exhibits ordered to be produced. These are the reports of interview, sworn statements, and Part II of the PRIME report. They cover both transactions under scrutiny. *See* Minutes of In-Chambers Proceedings, dated November 29, 2001, *Addendum "B" to this Opinion and Order.*

B. ***Plaintiff Daniel Pagán***

On March 22, 2001, an armed agent of the Puerto Rico Department of Justice Special Investigations Bureau, which is known by its Spanish acronym "NIE", served Plaintiff Pagán at his home with a summons to appear before the Blue Ribbon Commission on March 27, 2001. *Pls.' Exh. 1.*

In a letter dated March 26, 2001, Plaintiff Pagán notified León-Suárez that he had a previous appointment to appear before the Puerto Rico House of Representatives the following day. *See Pls.' Exh. 2.* Plaintiff Pagán informed León-Suárez that although he believed the Commission did not have the authority to issue summonses compelling witnesses to appear before it, he was more than willing to cooperate with the work of the Commission. Plaintiff Pagán spoke with attorney Andrés Guillemard regarding the drafting of the letter.

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Plaintiff Pagán believed that, although the Commission did not have the power to subpoena him, he was required to appear before it based on his previous experience of working with the Department of Justice and the NIE in investigations of other persons. In those prior investigations, formal actions had been initiated against certain individuals. In light of the fact that an armed law enforcement agent had appeared at his home to serve him with a summons from the Commission, Plaintiff Pagán perceived that the situation was very grave and he felt he had a responsibility to make an appearance. On the morning of April 25, 2001, Plaintiff Pagán appeared at the Commission's offices in the Red Palace. Plaintiff Pagán arrived alone because he believed he did not need the assistance of an attorney. León-Suárez, attorney Vilá-Pérez, and auditor Gutiérrez conducted the three-hour interview of Plaintiff Pagán.

According to Defendant Noriega-Rodríguez, the Commissioners did not suspect Plaintiff Pagán of having engaged in criminal conduct at the time of his appearance before the Commission. However, we note that at the time Plaintiffs Pagán and Aponte were interviewed, the bulk of the investigation had been completed. Plaintiff Pagán was the last witness to be called before the Commission. *See Court Exh. Nos. 4-2, 4-3.* Plaintiff Pagán was not given any specific advice about any right that may have attached to him in the context of the Commission's investigation. He was not advised of any circumstance under which he would have had the right to have an attorney present at the hearing. He was not told that he had a right to remain silent. Plaintiff Pagán was not informed that he had a right to bring witnesses or present other evidence on his behalf.

He requested that he be allowed to take notes of or record the investigative hearing. León-Suárez denied both of Plaintiff Pagán's requests. Vilá-Pérez equated the interview with a grand jury proceeding, and he explained to Plaintiff Pagán that witnesses testifying before a grand jury were not allowed to take notes or record the proceedings. Plaintiff Pagán then realized that he was the subject of the Commission's investigation. He requested that León-Suárez provide him with a copy of the internal procedural guidelines used by the Commission. León-Suárez agreed to answer his request at a later date, but then failed to do so. Plaintiff Pagán did not request the assistance of counsel.

At the hearing, Plaintiff Pagán offered information and documentary evidence to the Commission. He did not testify under oath and he did not sign any sworn statement, but the investigators reduced his interview to writing. *See Report of Interview, Court Exhibit 4-3.* Plaintiff Pagán was not confronted with any witnesses testifying against him.

On May 9, 2001, Defendants Calderón, Noriega-Rodríguez, and other Commissioners held a press conference to disclose the findings of the Commission's investigation regarding the lease and purchase of the Barbosa building. Prior to the press conference, Defendant Calderón had met with leaders of the Puerto Rico legislature, one of whom had stated publicly that the Commission's report contained accusations of a criminal nature.

The report was titled, "Irregularities in the Acquisition of the Building Located at 306 Barbosa and the Adjacent Lot at 307 Italia Street." *Pls.' Exh. 4.* At the press conference,

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Defendant Calderón announced that she was referring the matter to the Secretary of Justice of the Commonwealth of Puerto Rico, as the Commissioners had recommended. In addition to the accusations of criminal misconduct included in the report against both Pagán and Aponte, at the press conference Defendant Noriega-Rodríguez speculated that Plaintiff Aponte might have profited personally from the Barbosa transaction. At the time of the press conference, Plaintiffs Pagán and Aponte had not been given an opportunity to respond to the Commission's conclusions. In fact, neither had received a copy of the report.

With regard to Plaintiffs, the report makes the following specific conclusions:

> As a direct consequence of contracts approved in 1998 and 1999 by the CPA Jorge Aponte, then Director of the Office of Management and Budget (OGP), and by the engineer Daniel Pagán, then Secretary of the Department of Natural and [Environmental] Resources, in the process of acquiring for government purposes the building located at 306 Barbosa Avenue and the adjacent lot at 307 Italia Street, and between the lease and the purchase of those properties, public funds were paid out, amounting to $9,300,000, which sum is more than $7 million in excess of the fair market value of said properties. In the face of that situation, all possible legal avenues (administrative, civil, or criminal) which might allow the public treasury to recover the aforesaid excess, must be explored.

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> . . . The data compiled by the Commission in this case clearly revealed that both CPA Jorge Aponte, then Director of the OGP, and engineer Daniel Pagán, then Secretary of the DRNA, at the very least were grossly negligent in assigning the function of negotiating a multi-million-dollar transaction to certain subordinate functionaries who, in the Commission's judgment, lacked the necessary capability to handle a matter of such magnitude. Those data further reveal that both Messrs. Aponte and Pagán at the very least were repeatedly and grossly negligent in failing to adequately supervise the dealings that their aforesaid subordinates were making in the aforesaid transaction.

Pls.' Exh. 4. In their report, Defendant Commissioners also speculate that the Barbosa 306 transaction may have been hampered by "improper influences," and there may have been a conspiracy to defraud the public treasury.

On May 11, 2001, Plaintiff Pagán submitted a written request to León-Suárez for a copy of the Commission's report. *Pls.' Exh. 5.* Three days later, León-Suárez notified Plaintiff Pagán that she was not authorized to provide him with a copy of the report, and that she had forwarded his letter to La Fortaleza. *Pls.' Exh. 6.* On May 15, 2001, Defendant Calderón's legal advisor informed Plaintiff Pagán that he could obtain a copy of the document through La Fortaleza. *Pls.' Exh. 7.* Plaintiff Pagán picked up a copy of the Commission's report, which was missing the exhibits of the

evidence relied upon by the Commission and forwarded to the Governor.[5]

In a letter dated July 30, 2001, León-Suárez requested Plaintiff Pagán to appear for a second time before the Blue Ribbon Commission on August 6, 2001, in relation to its investigation of the remodeling of the Barbosa 306 building and of the contract between PRIME and the Solid Waste Authority, which is known by its Spanish acronym "ADS". *Pls.' Exh. 3.* The summons was delivered via certified mail with return receipt requested. Plaintiff Pagán chose not to appear at the scheduled hearing.

In late October 2001, the Commission delivered the first part of a report on its investigation into the contract between the Solid Waste Authority and PRIME. On October 31, 2001, Defendants Calderón and the Commissioners held a news conference to expose the contents of the report. The PRIME report included the following paragraph:

> Then-secretary of the DRNA, Engineer Daniel Pagán Rosa, improperly intervened in the stage of reconsideration of the awarding of a bid procedure to the ADS for a project for the recovery of clean material at the municipality of Toa Baja

5. This is the evidence which the court examined *in camera* and which Plaintiffs have never seen. Although we examined thirteen boxes of material, only the formal exhibits to the official reports, copies of the sworn statements, and reports of interview have been marked as Court Exhibits 4-1, 4-2, 4-3 (Barbosa 306 transaction), and Court Exhibits 8-1 and 8-2 (PRIME Report, Part II, and sworn statements and reports of interview).

> in particular. And after the bid board of the ADS had adjudicated said bid and they had reaffirmed their decision to deny a motion for reconsideration, Engineer Pagán Rosa ordered the president of the bid board to cause the disappearance of the documents which evidenced this last decision of the board, and in its place the board should annul the previously adjudicated bid.

Pls.' Exh. 8. Defendant Calderón forwarded the report to the Secretary of Justice, and the Secretary of Justice then referred the matter to the Special Independent Prosecutor. The Secretary of Justice had been apprised of the Commission's investigation into the PRIME matter since August, and the Commission had been working in close collaboration with the Department of Justice.

On November 1, 2001, the Commission submitted the second part of its report on the PRIME matter to Defendant Calderón. The Commissioners have given a presentation about the report to the Governor, but as of November 8, 2001, she had not read the document. On November 4, 2001, the Puerto Rico Department of Justice referred the matter to a Special Independent Prosecutor for further proceedings. *Docket Document No. 39. See* Part II of the PRIME Report, *Court Exh. 8-1.* On November 26, 2001, EL NUEVO DÍA, a local newspaper, published the results of Part II of the PRIME report. The court is not aware whether plaintiffs received a copy.

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IV.

Procedural History

On July 16, 2001, Plaintiffs filed the present complaint. *Docket Document No. 1.* While the complaint is somewhat tenebrous, we can discern that Plaintiffs are alleging violations of their First Amendment, equal protection, and due process rights guaranteed by the United States Constitution. U.S. CONST. amends. I, V, XIV. Plaintiffs also allege violations of Article II, Sections 1, 6, 7, and 8 of the Constitution of the Commonwealth of Puerto Rico, P.R. CONST. art. II, §§ 1, 6, 7, 8, and 31 L.P.R.A. § 5141 (1990). Plaintiffs aver that the Commission is invalid because it violates the principle of separation of powers enshrined in the Puerto Rico Constitution. Plaintiffs claim that this court has subject matter jurisdiction over their state-law claims pursuant to 28 U.S.C. § 1367 (1993).

Plaintiffs Aponte and Pagán each seek compensatory damages for violations of their federal constitutional rights and for Defendants' alleged tort-law violations. Plaintiffs allege that they have suffered great mental and emotional anguish due to the harm inflicted upon their personal and professional reputation. Plaintiffs maintain that Defendants' actions have prevented them from obtaining employment in the public and private sectors. In addition, Plaintiffs claim to have experienced tremendous fear and anxiety due to the possibility that frivolous criminal charges will be brought against them. Furthermore, Plaintiffs demand punitive damages.

Plaintiffs also seek a declaratory judgment stating that the Commission violates the United States Constitution and the Constitution and laws of Puerto Rico. Plaintiffs also request injunctive relief barring Defendants from violating Plaintiffs' constitutional rights and ordering Defendant Calderón to vacate Executive Order No. 2001-06 and to permanently dissolve the Commission.

On August 13, 2001, Plaintiff Pagán filed a motion for a preliminary injunction. *Docket Document No. 7.* Plaintiff Pagán requests that this court bar Defendants from further harassing him with respect to their investigation on the remodeling of the Barbosa building and on the contract between PRIME and the Solid Waste Authority. Defendants oppose Plaintiff Pagán's motion for a preliminary injunction. *Docket Document Nos. 12, 16, 22, 23.*

On September 4, 2001, Defendants Noriega-Rodríguez, Colón-Carlo, Vélez-Borrás, Galarza, López-Oliver, and Hermida ("Defendant Commissioners") filed a Rule 12(b)(6) motion to dismiss on the following grounds: (1) Plaintiffs' procedural due process claims fail because they have not identified a constitutionally protected liberty or property interest; (2) even if Plaintiffs' procedural due process rights were violated, such deprivations were "random and unauthorized," and Plaintiffs have failed to allege the unavailability of an adequate post-deprivation state-law remedy; (3) Plaintiffs' claims of denial of their right to a fair trial, the presumption of innocence, and effective assistance of counsel are not ripe; (4) defamation is not a constitutional cause of action; (5) Plaintiffs' conclusory allegations with regard to political discrimination are insufficient to state an equal protection or First Amendment claim; (6) Defendant

Commissioners are protected by the doctrine of qualified immunity; and (7) this court should decline to exercise supplemental jurisdiction over Plaintiffs' state-law claims.[6] *Docket Document No. 13.* Defendant Calderón joins Defendant Commissioners' motion to dismiss. *Docket Document No. 16.*

On September 5, 2001, Plaintiff Pagán filed a motion to supplement his preliminary injunction motion. *Docket Document No. 15.* Plaintiff Pagán contends that this court should rely on *Jenkins v. McKeithen,* 395 U.S. 411 (1969), to find that Plaintiffs have prevailed on the merits. Defendants filed a supplementary motion of law arguing that *Jenkins* does not apply to the instant case. *Docket Document Nos. 23, 25.*

On September 13, 2001, Plaintiffs filed a motion for partial summary judgment. *Docket Document No. 21.* Plaintiffs asseverate that they are entitled to judgment as a matter of law with regard to their First Amendment, equal protection, and due process claims. Plaintiffs' lengthy brief, which largely reiterates previous filings, does not

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6. Because Defendant Commissioners' brief is imprecisely drawn, at the outset it is unclear whether this court should treat the motion as a Rule 12(b)(6) motion or as a Rule 56 motion. The brief is titled "Motion to Dismiss and/or [for] Summary Judgment," and Defendant Commissioners state therein that this court may choose to apply either the Rule 12(b)(6) or the Rule 56 standard in disposing of the motion. Defendant Commissioners have attached a statement of facts not in controversy as well as two exhibits, an affidavit signed by León-Suárez and a copy of the Barbosa 306 report. We decide to treat the motion as one brought pursuant to Rule 12(b)(6).

present any new arguments for this court to consider. Defendants oppose Plaintiffs' summary judgment motion. *Docket Document Nos. 31, 32.*

On September 17, 2001, Defendant Calderón filed a Rule 12(b)(6) motion to dismiss the complaint against her on the following grounds: (1) the allegations of the complaint are insufficient to state a claim of defamation; (2) injury to one's reputation is only actionable under Section 1983 if the harm to reputation is accompanied by the loss of a current governmental entitlement; (3) the superfluous nature of the Blue Ribbon Commission is not a matter that this court should concern itself with; (4) *Jenkins* is not controlling; and (5) Defendant Calderón is entitled to absolute and/or qualified immunity. *Docket Document No. 25.* On September 28, 2001, Plaintiffs filed a consolidated opposition to Defendants' motions to dismiss. *Docket Document No. 30.*

On November 1, 2001, Plaintiff Pagán filed a motion for a temporary restraining order prohibiting Defendants from making further statements regarding the PRIME report. *Docket Document No. 36.* The court denied the request without prejudice due to the proximity of a scheduled hearing.

On November 6-8, 2001, this court held an injunctive relief hearing.[7]

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7. The parties had cluttered the record with many nebulous memoranda raising a multitude of issues, some of which were of questionable relevance and merit. On October 16, 2001, this court issued an Order clarifying the issues that warranted attention. *Docket*

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V.

Analysis

We assess the relevant arguments presented in the parties' various dispositive motions, along with Plaintiffs' requests for injunctive and declaratory relief.

A. *Ripeness*

We first consider whether this case is justiciable. The purpose of the ripeness doctrine is " 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.' " *Stern v. United States Dist. Court for the Dist. of Mass.*, 214 F.3d 4, 10 (1st Cir. 2000) (internal citation omitted). The "linchpin of ripeness . . . is adverseness." *Rhode Island v. Narragansett Indian Tribe,* 19 F.3d 685, 692 (1st Cir. 1994).

We find that Plaintiffs have a genuine threat of prosecution for the various criminal offenses outlined *infra.* The close collaboration between the Blue Ribbon Commission and law enforcement agencies, along with the public accusations of criminal misconduct against Plaintiffs,

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Document No. 35. We warned the parties that the injunctive relief hearing scheduled for November 6, 2001, could be consolidated with a trial on the merits in accordance with Federal Rule of Civil Procedure 65(a)(2). FED. R. CIV. P. 65(a)(2). At the conclusion of the hearing, the parties agreed that they did not have any further evidence to present, so we consolidated the injunctive relief hearing with the trial on the merits.

evidence the likelihood that Plaintiffs may be prosecuted for violations of Puerto Rico's Penal Code. Consequently, we find that the present case is ripe for adjudication. *See R.I. Ass'n of Realtors, Inc. v. Whitehouse,* 199 F.3d 26, 33 (1st Cir. 1999) (" 'Our conclusion that a reasonable threat of prosecution exists . . . effectively dispenses with any ripeness problem.' ") (internal citation omitted).

B. *Younger Abstention*

In *Younger v. Harris,* 401 U.S. 37 (1971), the Supreme Court held that federal courts are obligated to abstain from adjudicating federal claims if such adjudication would involve needless interference into state court criminal proceedings. *Id.* at 44. Pursuant to *Younger,* a federal court should abstain from deciding the merits of a case if

> [t]here is (1) an ongoing state judicial proceeding, instituted prior to the federal proceeding (or, at least, instituted prior to any substantial progress in the federal proceeding), that (2) implicates an important state interest, and (3) provides an adequate opportunity for the plaintiff to raise the claims advanced in his federal lawsuit.

Brooks v. N.H. Supreme Court, 80 F.3d 633, 638 (1st Cir. 1996). In certain circumstances, a federal court may be obligated to abstain from adjudicating a federal case to prevent interference with ongoing state administrative proceedings. *Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.,* 477 U.S. 619, 627 (1986).

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We find that the principles of *Younger* do not apply to the present case. First, there are no ongoing state criminal proceedings pending against Plaintiffs. Although the transactions investigated by the Blue Ribbon Commission have been referred to the Department of Justice, there have been no formal criminal charges filed against them. Second, there appears to be no ongoing state administrative proceeding involving Plaintiffs. The Commission's investigation of the Barbosa 306 transaction concluded in the spring of this year, and the report was released to the public on May 9, 2001. The Commission's investigation of the PRIME matter has also terminated, and the Commission forwarded the second and final part of its report to Defendant Calderón on November 1, 2001. Since there appears to be no ongoing state criminal or administrative proceedings involving Plaintiffs, we reject Defendants' contention that this court should abstain from deciding this case pursuant to *Younger.*

C. *Absolute Immunity*

Public officials acting in a legislative capacity enjoy absolute immunity from liability under Section 1983. *Romero-Barcelo v. Hernandez-Agosto,* 75 F.3d 23, 28 (1st Cir. 1996). The question of whether an official can properly invoke absolute immunity hinges on the function performed by that individual, not on his or her official title. *Acevedo-Garcia v. Vera-Monroig,* 204 F.3d 1, 8 (1st Cir. 2000). An official is protected by absolute immunity in the performance of legislative acts only; absolute immunity does not shield an official from liability for administrative or executive acts. *Id.* at 7-8.

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The test to determine whether an act is legislative or administrative is two-pronged.

> First, if the facts underlying the decision are 'generalizations concerning a policy or state of affairs,' the decision is legislative. If the decision stems from specific facts relating to particular individuals or situations, the act is administrative. Second, the court must consider 'the particularity of the impact of the state of action.' 'If the action involves establishment of a general policy, it is legislative;' if it 'single[s] out specifiable individuals and affect[s] them differently from others,' it is administrative.

Id. at 9.

Here, it appears that Defendant Calderón was inspired to create the Blue Ribbon Commission out of concern about purported corruption within a particular New Progressive Party administration. Defendant Calderón's promulgation of Executive Order 2001-06, receipt of investigative reports from the Blue Ribbon Commission, referral of matters to the Department of Justice, and staging of news conferences disclosing the findings of the Commission apparently stemmed from specific facts relating to the Rosselló administration. Even if this were not the case and Defendant Calderón's actions were motivated by a general, abstract policy against corruption, we note that Defendants' implementation of the executive order has unquestionably targeted particular individuals. *Cf. Acevedo-Garcia,* 204 F.3d at 8-9. The investigations carried out by the Blue Ribbon

Commission and the subsequent public accusations of misconduct unquestionably single out specific individuals, including Plaintiffs, and have profoundly and uniquely impacted their lives. We conclude that the creation and operation of the Blue Ribbon Commission is an administrative, not a legislative act, and that therefore Defendant Calderón is not entitled to absolute immunity.

D. *Injunctive Relief*

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, we consolidated the injunctive relief hearing with the trial on the merits, and we determine whether Plaintiffs are entitled to permanent injunctive relief. FED. R. CIV. P. 65(a)(2).

To issue a permanent injunction, a district court must make the following findings: "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." *A.W. Chesterton Co. v. Chesterton,* 128 F.3d 1, 5 (1st Cir. 1997).

1. *Success on the Merits*

To prevail on a Section 1983 claim, a plaintiff must make two showings: " '(i) that the conduct complained of has been committed under color of state law,[8] and (ii) that this conduct

8. Defendants have not argued that they were private actors in the context of the present case. We find that Plaintiffs have made the

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worked a denial of rights secured by the Constitution or laws of the United States.' " *Collins v. Nuzzo,* 244 F.3d 246, 250 (1st Cir. 2001).

a. *First Amendment*

Plaintiffs argue that their constitutional rights to freedom of speech and of association have been violated by the actions of the Commission. According to Plaintiffs, Defendants invidiously discriminated against Plaintiffs due to their political affiliation, in violation of the First Amendment. Plaintiffs claim that the Blue Ribbon Commission is an instrument used by the Popular Democratic Party ("PDP") to persecute persons who advocate statehood for Puerto Rico. Plaintiffs allege that the following facts evidence Defendants' discriminatory animus against Plaintiffs on the basis of their affiliation with the New Progressive Party ("NPP"): (1) Defendant Calderón has made numerous public statements about the allegedly widespread corruption within the Rosselló administration; (2) none of the members of the Commission are affiliated with the New Progressive Party; (3) several Commissioners have had ties with PDP administrations and Defendant Noriega-Rodríguez ran for governor on the Puerto Rican Independence Party ticket; (4) the Commission is purportedly focused only on questionable transactions of the Rosselló administration; (5) other government institutions, such as the Office of the

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showing of public action necessary to invoke the protections of the United States Constitution. For an illustrative discussion of the public/private dichotomy and the state action requirement, see *Perkins v. Londonderry Basketball Club,* 196 F.3d 13 (1st Cir. 1999).

Comptroller, the Department of Justice, and the Office of the Special Independent Prosecutor fulfill similar functions as the Commission, and, therefore, the Commission is superfluous; (6) Defendant Calderón's process of selecting Commissioners is subjective and arbitrary; (7) Defendant Commissioners serve at the pleasure of Defendant Calderón and therefore lack independence from her; and (8) Executive Order 2001-06 and the Commission's internal regulations lack guidelines as to how the Commission should select transactions to investigate and how the Commission should conduct its investigations so as to protect the constitutional rights of persons under scrutiny.

The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The primary purpose of the First Amendment is to protect political expression. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.50 (3d ed. 1999).

The First Circuit has not developed a general standard for courts to evaluate all types of alleged First Amendment violations in Section 1983 cases. *See Romero Barcelo v. Hernandez Agosto,* 876 F.Supp. 1332, 1347 (D.P.R.1995), *aff'd,* 75 F.3d 23 (1st Cir. 1996). The courts have held that the First Amendment prohibits certain types of government action which limit individuals' freedom to speak and to participate in political activities. For example, the First

Circuit has ruled that non-policymaking public employees may not be terminated because of their political views. *See, e.g., Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 74 (1st Cir. 2000). Public employees may also sustain a Section 1983 First Amendment claim on the basis of an adverse employment action taken against them in relation to speech regarding public matters. *Tang v. State of R.I., Dep't of Elderly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998). The First Circuit has not, however, formulated a general standard to be applied in First Amendment cases that do not arise in particular contexts such as these.

The crux of Plaintiffs' First Amendment claim is that Plaintiffs are associated with the New Progressive Party, while Defendants are not. Plaintiffs conclude that the actions taken by Defendants constitute a violation of Plaintiffs' First Amendment right to associate with the political party of their choosing. We find that Plaintiffs have not prevailed on the merits of their First Amendment claim. The bare fact that Defendants are not openly identified with Plaintiffs' party of choice, the New Progressive Party, clearly does not rise to the level of a First Amendment violation. *See Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 58 (1st Cir. 1990) ("Merely juxtaposing a protected characteristic-someone else's politics-with the fact that plaintiff was treated unfairly is not enough to state a constitutional claim."). If this court were to conclude otherwise, every disgruntled individual who had been subjected to any kind of undesired treatment by a state actor affiliated with a rival political group would be able to seek relief in federal court for infringements upon his or her First Amendment rights. Despite Plaintiffs' protestations to the contrary, the Constitution does not afford such sweeping protections.

b. *Equal Protection*

In addition to their First Amendment and due process claims, Plaintiffs have alleged a violation of the equal protection clause of the Fourteenth Amendment. Since the class allegedly suffering discrimination consists of persons belonging to a particular political party, we find that the so-called equal protection claim is nothing more than a restatement of Plaintiffs' First Amendment claim. Viewing it as such, and concluding that Plaintiffs cannot, by pleading equal protection, outdistance the constitutional protection afforded by the First Amendment, we dismiss Plaintiffs' equal protection claims. *See* 3 ROTUNDA & NOWAK, § 18.40 ("It is generally unnecessary to analyze laws which burden the exercise of First Amendment rights by a class of persons under the equal protection guarantee, because the substantive guarantees of the Amendment serve as the strongest protection against the limitation of these rights.").

c. *Procedural Due Process*

Under the Fourteenth Amendment to the Constitution, no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. IV, § 1. The essential inquiry under the due process clause is whether Plaintiffs were treated fairly. 3 ROTUNDA & NOWAK, § 17.8. The Constitution demands that the state cannot deprive an individual of a significant interest in liberty or property without first warning the individual and providing "an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Amsden v. Moran,* 904 F.2d 748, 753 (1st Cir. 1990) (quoting *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)).

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To establish a procedural due process claim, a plaintiff must show that (1) he has a constitutionally protected interest in life, liberty, or property, and (2) the state deprived him of that interest without due process of law. *See Romero-Barcelo,* 75 F.3d at 32; *PFZ Props., Inc. v. Rodriguez,* 928 F.2d 28, 30 (1st Cir. 1991).

Plaintiffs argue that they have a constitutionally protected property and liberty interest in their good name. Plaintiffs Pagán and Aponte both testified that Defendants' conduct has caused serious injury to their professional reputations. Plaintiffs claim that their careers have suffered greatly as a result of the Commission's issuance of reports accusing them of criminal activity. Plaintiffs also maintain that they were denied their constitutional right to a fair trial in which defendants are to be presumed innocent and to be assisted by counsel.

An individual's interest in his reputation is constitutionally protected only if the interest is

> [a]ccompanied by a change in the [victim's] status or rights (under substantive state or federal law), perhaps as a touchstone (or concrete evidence) of the fact that the injury to reputation was inflicted as a result of a conscious government policy and is serious enough to interfere with other liberties of the sort suggested in *Meyer* [*v. Nebraska,* 262 U.S. 390 (1923)].

Beitzell v. Jeffrey, 643 F.2d 870, 878 (1st Cir. 1981).

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The Constitution of the Commonwealth of Puerto Rico protects an individual from attacks on his reputation. P.R. CONST. art. II, § 8 ("Every person has the right to the protection of law against abusive attacks on his honor, reputation and private or family life."). The First Circuit has found that Section 8 may create a constitutionally protected liberty interest in one's reputation. *Romero-Barcelo,* 75 F.3d at 33. An individual does not enjoy a constitutionally protected interest in his own reputation unless the harm to his reputation is "unusually serious." *Beitzell,* 643 F.2d at 878.

This court need not decide whether Plaintiffs' interest in their reputation rises to a constitutionally protected level in the case at bar, because we find that Plaintiffs have a fundamental, constitutionally protected liberty interest in being free from investigation and prosecution for criminal offenses in a manner that tramples upon the procedural protections afforded by the Fourteenth Amendment. *See, e.g., Jenkins v. McKeithen,* 395 U.S. 411 (1969) (explicated *infra*); *Gabrilowitz v. Newman,* 582 F.2d 100, 107 (1st Cir. 1978) (student had a due process right to counsel at a college disciplinary hearing due to the pending criminal case against him); *Watson v. County of Riverside,* 976 F.Supp. 951, 956 (C.D. Ca. 1997) (due in part to the possibility of criminal prosecution, police officer had a due process interest in being represented by counsel in relation to the drafting of a report about an incident of police brutality). The due process clause requires the imposition of numerous procedural safeguards at every stage of the criminal investigatory and adjudicatory process for the protection of individuals. *See* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.7(a) (2d ed. 1999).

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The liberty interest protected by the due process clause plainly includes liberty from unjust imprisonment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty "denotes not merely freedom from bodily restraint"). Although they have not yet been formally charged, Plaintiffs have been accused of serious violations of the Puerto Rico criminal code, and they have a protected interest in being free from prosecution in a manner that does not uphold constitutional requisites of due process.

The May 1, 2001 Commission report included the following conclusion:

> The data compiled by the Commission in this case clearly revealed that both CPA Jorge Aponte, then Director of the OGP, and engineer Daniel Pagán, then Secretary of the DRNA, at the very least were grossly negligent in assigning the function of negotiating a multi-million-dollar transaction to certain subordinate functionaries who, in the Commission's judgment, lacked the necessary capability to handle a matter of such magnitude. Those data further reveal that both Messrs. Aponte and Pagán at the very least were repeatedly and grossly negligent in failing to adequately supervise the dealings that their aforesaid subordinates were making in the aforesaid transaction.

Pls.' Exh. 4. At a bare minimum, the report clearly accuses Plaintiffs of violating Section 4366 of the Puerto Rico Penal Code:

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> Every public officer who wilfully neglects to perform the duties of his office or employment, or who violates any legal provision relative to his duties or those of his office or employment, for which no special provision fixing the corresponding penalty is prescribed, shall be punishable by imprisonment not exceeding six months or a fine not exceeding five hundred dollars, or both, in the discretion of the court.

33 L.P.R.A. § 4366 (1983). In addition, Plaintiffs are at risk of prosecution for committing crimes against public funds in violation of Section 4391.

> Any public official or employee and any person in charge of receiving, keeping, transferring or reimbursing public funds who performs any of the following acts shall be punished with imprisonment for a fixed term of six (6) years:
>
> . . . .
>
> (k) Neglects or fails to safekeep or disburse public funds as prescribed by law.

33 L.P.R.A. § 4391 (1983 & Supp. I 1998).

The PRIME report released on October 31, 2001, contained the following conclusion accusing Plaintiff Pagán of criminal conduct:

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> Then-secretary of the DRNA, Engineer Daniel Pagán Rosa, improperly intervened in the stage of reconsideration of the awarding of a bid procedure to the ADS for a project for the recovery of clean material at the municipality of Toa Baja in particular. And after the bid board of the ADS had adjudicated said bid and they had reaffirmed their decision to deny a motion for reconsideration, Engineer Pagán Rosa ordered the president of the bid board to cause the disappearance of the documents which evidenced this last decision of the board, and in its place the board should annul the previously adjudicated bid.

Pls.' Exh. 8. The Commission concluded that Plaintiff Pagán had committed undue intervention in the performance of contracts, bidding procedures or government operations in violation of Section 4353a of the Penal Code:

> Every public official or employee who, without legal authority, intervenes unduly in the performance of a contract, bidding procedure or any other operation of the Government of the Commonwealth of Puerto Rico by willfully omitting or committing any act that constitutes an unequivocal violation of the laws, regulations and norms applicable to these transactions with the sole purpose of benefiting a particular person, shall be punished by imprisonment for a fixed term of three (3) years. In the event of aggravating circumstances, the established fixed term shall be

> increased up to a maximum of five (5) years; if there were extenuating circumstances, it shall be reduced to a minimum of two (2) years.

33 L.P.R.A. § 4353a (1983 & Supp. I 1998). In addition, Plaintiff Pagán may be prosecuted for committing destruction or mutilation of documents in violation of Section 4356 of the Penal Code:

> Every public officer or employee in charge of the custody of any original public document . . . who willfully takes, destroys, removes or conceals in whole or in part, or who permits another person to do so, shall be punishable by imprisonment for a fixed term of six (6) years. If there were aggravating circumstances, the fixed penalty established may be increased up to a maximum of ten (10) years; if there were extenuating circumstances it could be reduced to a minimum of four (4) years.

33 L.P.R.A. § 4356 (1983 & Supp. I 1998).

Given the likelihood that serious criminal charges will be brought against Plaintiffs as a result of the Commission's investigations, it is pellucid that Plaintiffs have a constitutionally protected liberty interest in ensuring that the state acts in accordance with due process standards in the prosecution of Plaintiffs.

The requirements of procedural due process are flexible and depend on the specific situation at issue. *Amsden,*

904 F.2d at 753. The United States Supreme Court enunciated the factors that must be balanced in a procedural due process analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Id. at 334-35. When the government deprives an individual of an interest in life, liberty, or property, the elements of due process which may be required are:

> (1) adequate notice of the charges or basis for government action; (2) a neutral decision-maker; (3) an opportunity to make an oral presentation to the decision-maker; (4) an opportunity to present evidence or witnesses to the decision-maker; (5) a chance to confront and cross-examine witnesses or evidence to be used against the individual; (6) the right to have an attorney present the individual's case to the decision-maker; [and] (7) a decision based on the record with a statement of reasons for the decision.

3 ROTUNDA & NOWAK, § 17.8. Furthermore, in the context of criminal proceedings or other formal adjudicative processes, the following elements may be required: "(1) the right to

compulsory process of witnesses; (2) a right to pre-trial discovery of evidence; (3) a public hearing; (4) a transcript of the proceedings; (5) a jury trial; [and] (6) a burden of proof on the government greater than a preponderance of the evidence standard."[9] *Id.*

In *Jenkins v. McKeithen,* 395 U.S. 411 (1969), the United States Supreme Court examined the constitutionality of a Louisiana statute which created a Labor-Management Commission of Inquiry. The purpose of the commission was to investigate facts relating to violations of criminal laws in the area of labor-management relations. The Supreme Court reversed the dismissal of the case by the lower court.

The Louisiana commission was created to supplement the efforts of law enforcement agencies in the investigation of violations of criminal laws. Upon referral by the governor, the commission could hold a public hearing to determine the facts relating to alleged criminal activity. The commission was empowered to adopt its own rules and regulations, to employ investigative, legal, and other staff members, to require the attendance of witnesses, and to compel the production of documentary evidence. The commission could enforce its orders through contempt proceedings in state courts.

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9. In addition, under certain circumstances, a person suspected of having committed a crime has the right to be advised of his or her constitutional rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). The *Miranda* rules are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected." *Michigan v. Tucker,* 417 U.S. 433, 444 (1974).

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In *Jenkins,* the commission made public findings as to whether probable cause existed that a crime had occurred. The Louisiana commission did not have the authority to render adjudications that were binding on any persons; it could only make conclusions as to whether particular individuals had participated in criminal activity and offer recommendations to the governor for further proceedings.

If the commission found probable cause, it was required to report its conclusions to the relevant state or federal authorities. The commission also had authority to file charges. In addition, the commission could ask the governor to refer matters to the state attorney general for prosecution.

Witnesses called to testify before the Louisiana commission were apprised of the general subject of investigation prior to the hearing. Witnesses had the right to the services of an attorney, although the commission could impose limitations on counsel's participation in the hearing to prevent interference with the proceedings. The attorney could question his own client, but the witness and his counsel had only a limited right to examine other witnesses. Witnesses could request that particular questions be asked of other witnesses, but the commission had final authority to decide which questions to ask the individuals who appeared before it.

Although the Louisiana commission generally presided over public hearings, it could meet in executive session if it appeared that a witness' testimony would "tend to degrade, defame or incriminate any person." In executive session, the commission was required to allow the individual who

might be presented in a negative light the opportunity to testify on his own behalf and to present witnesses in his defense.

The *Jenkins* Court noted that the commission did not function in an adjudicative capacity in the same manner as a court. 395 U.S. at 427. However, the Court found that the findings prepared by the commission were very similar to an official adjudication of criminal culpability by a court of law. *Id.*

The Court found that the procedural protections offered by the Louisiana commission did not meet the standards imposed on the states pursuant to the due process clause of the Fourteenth Amendment. *Id.* at 428. ("[I]t is clear the procedures of the Commission do not meet the minimal requirements made obligatory on the States by the Due Process Clause of the Fourteenth Amendment."). The Court stressed that the right to confront and cross-examine witnesses is an essential component of due process. *Id.* Since the commission made actual determinations that particular individuals were guilty of committing a crime, the Court found that the commission's restrictions on witnesses' right to confront and cross-examine witnesses was unconstitutional. *Id.* at 429. ("[W]e think that due process requires the Commission to afford a person being investigated the right to confront and cross-examine the witnesses against him, subject only to traditional limitations on those rights.").

In addition, the *Jenkins* Court emphasized that the right to present evidence on one's behalf is a fundamental element of procedural due process. *Id.* When the commission met in

executive session, a person who was being investigated could call a "reasonable number of witnesses" to testify, but if the commission held a public hearing, the individual could only present his own testimony and the "pertinent" written declarations of other witnesses. In a public hearing, the commission could deny an individual the right to proffer oral testimony of other witnesses, and the commission could refuse to subpoena witnesses an individual might wish to testify. The Court concluded that the commission should not impose such restrictions on a person's ability to present his version of the facts.

The Blue Ribbon Commission shares many key similarities with the Louisiana Labor-Management Commission of Inquiry. The Blue Ribbon Commission is involved in investigating criminal activity and making findings that specific individuals engaged in criminal conduct. Like the Louisiana commission, the Blue Ribbon Commission supplements the efforts of other law enforcement agencies in the investigation of criminal violations. The Blue Ribbon Commission has the power to adopt its own bylaws, to employ investigative and other staff members, to coerce the attendance of witnesses, and to compel the production of documentary evidence.

The Blue Ribbon Commission, like the Louisiana commission, does not function in an adjudicative capacity in the same manner that a court does. The Louisiana commission did not have the power to render adjudications that were binding on any persons; it could only make recommendations to the governor for him or her to take further action to prosecute named persons. Likewise,

the reports issued by the Blue Ribbon Commission are not obligatory, and the Commission can only offer recommendations that Defendant Calderón refer a particular matter to the Department of Justice for prosecution.

The *Jenkins* Court concluded that the findings prepared by the Louisiana commission were very much like an official adjudication of criminal culpability by a court of law. *Id.* at 427. Likewise, we find that the reports submitted by the Blue Ribbon Commission to Defendant Calderón are very similar to an official determination of guilt by a legal tribunal. The Blue Ribbon Commission uses its broad powers to collect testimonial and documentary evidence that named individuals committed criminal offenses, and it then makes findings that those individuals were guilty of criminal activity. We find that *Jenkins* governs the present case.

Defendants have attempted to distinguish *Jenkins* from the case at bar. Defendants argue that the main opinion in *Jenkins* carries limited weight, because it is only a plurality opinion. Defendants also emphasize that the Court only held that the plaintiff had alleged a cause of action, not that he had prevailed on his constitutional claim. Defendants argue that *Jenkins* does not apply here because of the following alleged characteristics of the Blue Ribbon Commission, which were not shared by the Louisiana commission: (1) the Blue Ribbon Commission is not responsible for law enforcement and may render recommendations for legislative or other measures; (2) the Blue Ribbon Commission may act sua sponte and is independent from the Governor; (3) the Blue Ribbon Commission operates in strict confidentiality; (4) the Blue Ribbon Commission cannot issue

subpoenas and cannot compel individuals to appear before it; (5) the Blue Ribbon Commission does not make findings of probable cause of criminal violations; (6) the Blue Ribbon Commission is not required to report its findings to law enforcement authorities and may only issue reports to the Governor; and (7) the Blue Ribbon Commission does not have the power to initiate criminal proceedings. Furthermore, Defendants argue that *Jenkins* does not apply, because the defendants therein had been accused of coercing government officials into filing false criminal charges and intimidating judicial officers. Defendants conclude that *Hannah v. Larche,* 363 U.S. 420 (1960), controls.

This court is not persuaded by Defendants' arguments. We dispute several of Defendants' characterizations of the Blue Ribbon Commission. We find that the Blue Ribbon Commission serves "a function very much akin to making an official adjudication of criminal culpability." *See Jenkins,* 395 U.S. at 427. The Commission makes actual findings that named individuals are guilty of criminal violations as part of a process of criminal prosecution. Therefore *Jenkins,* not *Hannah,* governs.

Furthermore, we are troubled by the secrecy surrounding the Blue Ribbon Commission's investigations. *See Hannah,* 363 U.S. at 496 (Douglas, J., dissenting). The veil of secrecy shrouding the Commission's hearings increases the probability that abuses might take place behind closed doors.

This court finds that the procedures employed by the Blue Ribbon Commission are far less protective of Plaintiffs' procedural rights compared with those applied by the

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Louisiana Labor-Management Commission of Inquiry that were analyzed by the Supreme Court in *Jenkins*.

The *Jenkins* Court found that the Louisiana commission's restrictions on individuals' right to confront and cross-examine witnesses were unconstitutional. *Id.* at 428. The Louisiana commission allowed individuals under investigation only a limited opportunity to examine other witnesses. An individual testifying before the commission could ask that particular questions be asked of other witnesses, but only those questions approved by the commission would be submitted to the witnesses who testified before it.

In the present case, individuals who are being investigated by the Blue Ribbon Commission have no right to confront and cross-examine witnesses testifying against them. Persons who are under scrutiny by the Commission are not even informed of the names of the individuals offering evidence against them. As the Supreme Court noted in *Jenkins,* the right to confront and cross-examine witnesses is one of the most fundamental elements of due process. *Id.* Persons investigated by the Blue Ribbon Commission have no opportunity to examine witnesses offering testimony that they have engaged in criminal conduct.

Furthermore, the *Jenkins* Court found that the Louisiana commission's restrictions on an individual's ability to present evidence on his own behalf were of questionable constitutionality. *Id.* at 429. ("[A] person's right to present his case should not be left to the unfettered discretion of the Commission."). When the Louisiana commission met in

executive session, a person being investigated could present testimony from a "reasonable number of witnesses." When the commission held public hearings, an individual under investigation could only offer his own testimony and the "pertinent" written statements of other witnesses. When it met in public hearings, the Louisiana commission could prevent a person under investigation from presenting the oral testimony of other witnesses in his defense.

Here, the procedural regulations of the Blue Ribbon Commission do not offer individuals under investigation any opportunity to produce other witnesses to testify on their behalf. The right to present witnesses on one's behalf is a critical component of due process, *see id.*, and Plaintiffs were not afforded any opportunity to do so.

We apply the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The private interest affected by the official action, Plaintiffs' interest in being free from investigation and prosecution for criminal violations in an unconstitutional manner, is obviously a vital interest, considering that Plaintiffs risk facing substantial terms of imprisonment. The current procedure employed by the Commission entails a substantial risk that Plaintiffs will be wrongly deprived of their liberty interest. The use of additional procedural safeguards would be highly valuable in securing compliance with the Fourteenth Amendment. If an individual being investigated by the Blue Ribbon Commission was provided a meaningful opportunity to present documentary and testimonial evidence to a neutral decision-maker and to confront and cross-examine witnesses offered against him or her, such measures would help ensure

that Defendants comply with due process. *See* 3 ROTUNDA & NOWAK, § 17.8. The state's burden in allowing such safeguards would be moderate in comparison with the grave liberty interests at stake.

In conclusion, we find that Defendants' treatment of Plaintiffs in the context of the Commission's investigations did not comport with the constitutional requirement of fundamental fairness.[10] Plaintiffs were not afforded "an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Amsden v. Moran,* 904 F.2d 748, 753 (1st Cir. 1990). We conclude that Plaintiffs have prevailed on the merits of their procedural due process claim.

Defendants argue that Plaintiffs have adequate post-deprivation state-law remedies for the violations of their procedural due process rights. We disagree. "A procedural due process claim is not actionable unless, *inter alia,* no adequate 'post-deprivation remedy' is available under state law." *Perez-Ruiz v. Crespo-Guillen,* 25 F.3d 40, 42 (1st Cir. 1994).

> In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself

10. Nothing in our present ruling affects the procedures employed by grand juries in their investigations of criminal activity. See *Hannah,* 363 U.S. at 497-508 (Douglas J., dissenting), for a discussion of the unique historical role of grand juries in our criminal justice system.

> unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law* . . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 125-26 (1990). Since we have already examined the procedures used by the Commission and found them wanting, we turn to the state-law remedies available to Plaintiffs. Since Defendants have not specified which state-law post-deprivation causes of action allegedly provide adequate remedies to Plaintiffs, we are left to use our imaginations.

Plaintiffs may be able to frame their local law compensatory damages claim as one for defamation.[11] Since Plaintiffs were high-level officials in the Rosselló administration, they would qualify as public figures. *Pages v. Feingold,* 928 F. Supp. 148, 154 (D.P.R. 1996). To prevail

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11. In their complaint, Plaintiffs seek compensatory damages for Defendants' alleged violation of 31 L.P.R.A. § 5141. It is unclear from the pleadings whether Plaintiffs' claim is one for defamation or another tort.

on a defamation claim, a public figure must demonstrate by clear and convincing evidence that "a falsehood [was] published with 'actual malice' by the defendant (meaning a knowing falsehood or one made recklessly)." *Emerito Estrada Rivera-Isuzu de P.R., Inc. v. Consumers Union of United States, Inc.*, 233 F.3d 24, 27 (1st Cir. 2000). We find that the barriers to relief through a lawsuit for defamation are so high as to constitute an inadequate remedy for the deprivation of Plaintiffs' procedural rights.

Puerto Rico tort law provides a cause of action for malicious prosecution. To state a cause of action, a plaintiff must demonstrate that "(1) the criminal action was initiated and instigated by the defendant; (2) the criminal action terminated in favor of the plaintiff; (3) the defendant initiated the action with malice and without probable cause; and (4) as a consequence, the plaintiff suffered damages." *Negron-Rivera v. Rivera-Claudio,* 204 F.3d 287, 290 (1st Cir. 2000). We conclude that an action for malicious prosecution would provide an inadequate post-deprivation remedy to Plaintiffs. Most importantly, Plaintiffs would have to be prosecuted and then acquitted in state court. Since formal charges have not been filed against Plaintiffs, it is questionable, at best, whether Plaintiffs would be able to avail themselves of an action for malicious prosecution.

2. *Irreparable Injury*

To award equitable relief, this court must conclude that Plaintiffs would suffer an irreparable injury in the absence of an injunction. "When an alleged deprivation of a constitutional right is involved, most courts hold that no

further showing of irreparable injury is necessary." 11A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2948.1 (2d ed. 1995). "The threat of prosecution under the penal provisions of the pertinent laws establishes the threat of irreparable injury required by traditional doctrines of equity." *Glenwal Dev. Corp. v. Schmidt,* 336 F.Supp. 1079, 1083 (D.P.R. 1972). Since Plaintiffs are at risk of criminal prosecution as a result of Defendants' conduct, we find that they have met the requirement of irreparable injury necessary for injunctive relief.

3. *Balance of Equities*

To award a permanent injunction, a court must find that "the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction." *A.W. Chesterton Co.,* 128 F.3d at 5.

As discussed above, Plaintiffs would suffer serious injury if this court did not impose an injunction upon Defendants. Defendant Commissioners have already accused Plaintiffs of committing negligence in the performance of their public duties in connection with the Barbosa 306 transaction, and they are subject to imprisonment for a term of up to six years pursuant to 33 L.P.R.A. § 4366 and 33 L.P.R.A. § 4391. Furthermore, the PRIME report charges Plaintiff Pagán of having committed undue intervention in the performance of contracts, bidding procedures, or government operations in violation of 33 L.P.R.A. § 4353a. That statute authorizes a term of imprisonment of up to five years. Plaintiff Pagán may also be prosecuted for destruction of public documents under 33 L.P.R.A. § 4356, and the penalty for that violation

is four to ten years of imprisonment. Part II of the PRIME report, which was submitted to Defendant Calderón on November 1, 2001 and was released to the public while this case was sub judice, contains further findings of potential criminal conduct allegedly committed by Plaintiff Pagán that will cause him greater harm and an increased risk of prosecution.[12] The second part of the PRIME report also charges other government officers with criminal misconduct and extends its imputations of criminal activity to violations of the professional canons of ethics governing lawyers by the law firm of Cancio, Nadal, Rivera, Díaz and Berríos, private attorneys retained by PRIME. The law firm has not been given an opportunity to defend itself against such serious accusations. *See Ct. Exh. 8-2 (Sworn Statement of Carlos Manuel Rivera Vicente, Esq.).* The Commission may decide to initiate further investigations involving Plaintiffs. We find that any harm that would be suffered by Defendants due to the issuance of an injunction pales in comparison to the harm that would be experienced by Plaintiffs in the absence of an

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12. Although the two known Blue Ribbon Commission investigations involving Plaintiffs have concluded and the findings have been submitted to the Governor and released to the public, we find that the present case is not moot for purposes of assessing Plaintiffs' request for injunctive relief. There is a reasonable expectation that Defendants would continue to violate individuals' constitutional rights, if this court did not issue an injunction, and Defendants' previous violations continue to affect Plaintiffs. *See Metro-Goldwyn Mayer, Inc. v. Safety Prods., Inc.*, 183 F.3d 10, 15 (1st Cir. 1999). Defendants have not met the heavy burden of showing that their past violations of individuals' procedural rights probably would not recur. *See id.* There is nothing in the record to show that Defendant Commissioners are disinclined to perform their investigations in the same manner as they did previously.

injunction. Therefore, we conclude that the balance of the equities weighs in favor of awarding injunctive relief.

4. *Public Interest*

This court must determine if the public interest would be harmed by the imposition of the injunctive relief requested by Plaintiffs. As the members of the Commission themselves have noted in their Barbosa 306 report, numerous government agencies, including the Comptroller's Office, the Government Ethics Office, the Department of Justice, the Special Independent Prosecutor's Office, the Office of Management and Budget, and the Legislative Assembly, are already involved with investigating corruption of government officials and promoting the efficient use of public funds. *Pls.' Exh. 4.* This court concludes that the public interest would not be harmed in any way from the imposition of an injunction against Defendants, since there are already numerous existing organizations which perform the same function of investigating corruption. Furthermore, the public interest would likely be better served by an award of injunctive relief preventing Defendants from further abusing the due process rights of individuals, whether they be Plaintiffs or other persons similarly situated.

This court hereby grants Plaintiffs' request for a permanent injunction prohibiting Defendants from holding investigative hearings without affording individuals under investigation substantial opportunity to defend, among other rights, the right to present testimonial and documentary evidence on their behalf and to confront and cross-examine witnesses.

Appendix C

E. *Declaratory Relief*

Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 (1994), federal courts may enter a judgment declaring the rights of parties in relation to each other.[13] "In general, a party seeking declaratory relief must establish that the federal court has subject matter jurisdiction . . . and the existence of an actual controversy." 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 57.09 (3d ed. 2000). If these two requirements have been met, a federal court enjoys broad discretion in deciding whether to award a declaratory judgment. *See Ernst & Young v. Depositors Econ. Prot. Corp.*, 45 F.3d 530, 534 (1st Cir. 1995); 12 MOORE ET AL., § 57.09. In deciding whether to grant declaratory relief, courts consider whether a declaratory judgment would further the interests of the parties or the public, and whether such relief would clarify pending legal questions. *Metro. Prop. & Liab. Ins. Co. v. Kirkwood,* 729 F.2d 61, 62 (1st Cir. 1984).

Plaintiffs request a declaratory judgment concluding that the Blue Ribbon Commission and Executive Order

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13. The statute stipulates:

> In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a).

No. 2001-06 are unconstitutional. We conclude that the public interest would be furthered by an award of declaratory relief. This court hereby declares that the procedures employed by the Blue Ribbon Commission in the investigation of public corruption are fundamentally unfair and contravene the requisites of the due process clause of the Fourteenth Amendment.

F. *Qualified Immunity*

Qualified immunity is an affirmative defense shielding public officials from civil damages so long as their conduct does not violate any clearly-established statutory or constitutional right of which a reasonable person would be aware. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *Nereida-Gonzalez v. Tirado-Delgado,* 990 F.2d 701, 704 (1st Cir. 1993). *See also Mitchell v. Forsyth,* 472 U.S. 511, 525-26 (1985). In certain situations, private individuals such as Defendant Commissioners may also raise a defense of qualified immunity, because they perform the same function as public officials. *Frazier v. Bailey,* 957 F.2d 920, 928-29 (1st Cir. 1992). The doctrine consists of two analytical prongs.

First, the court must determine as a matter of law whether the constitutional right in question was clearly established at the time of the alleged violation. *See Marinez-Rodriguez v. Colon-Pizarro,* 54 F.3d 980, 988 (1st Cir. 1995). Second, the court must decide whether a reasonable, similarly situated official would understand that the challenged conduct violated the established constitutional right. *See Anderson v. Creighton,* 483 U.S. 635, 638-40 (1987); *Frazier,* 957 F.2d at 929. "The contours of the right must be sufficiently clear

that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640.

With regard to the first prong of the analysis, it has been clearly established that individuals have a right to be free from investigation, prosecution, and subsequent incarceration in a manner that tramples upon the procedural safeguards enshrined in the Constitution. There exist elaborate procedural mechanisms, at both the state and federal levels, to ensure that no individual is convicted of a crime and deprived of his liberty in a manner that is fundamentally unfair, i.e., in a manner that violates due process. See 1 LAFAVE ET AL., § 2.7(a) for an exhaustive list of the procedural safeguards required pursuant to the due process clause in the context of criminal proceedings. With regard to the determination of probable cause that a criminal violation has occurred, the Supreme Court clearly held in *Jenkins v. McKeithen,* 395 U.S. 411 (1969), that an individual being investigated for alleged criminal activity must be afforded substantial opportunity to present evidence, including oral testimony from other witnesses, on his or own behalf and to confront and cross-examine witnesses. "Government officials are charged with knowledge of constitutional developments, including all available decisional law." *Tribble v. Gardner,* 860 F.2d 321, 324 (9th Cir. 1988). Consequently, we conclude that, at the time of the events underlying this lawsuit, it had been clearly established that Plaintiffs have a Fourteenth Amendment right to certain due process safeguards in the context of a probable-cause determination.

We now turn to the second prong of the analysis, whether a reasonable, similarly situated official would have recognized that the challenged conduct violated Plaintiffs'

due process rights. The second prong of the analysis, "while requiring a legal determination, is highly fact specific." *Swain v. Spinney,* 117 F.3d 1, 9 (1st Cir. 1997).

Plaintiffs Pagán and Aponte were both served with summons to appear before the Blue Ribbon Commission by armed law enforcement agents who visited their homes. According to Executive Order 2001-06, the Commission had the authority to "*require* the assistance of functionaries belonging to the Executive Branch in order to obtain, through the mechanisms provided by law, the appearance of any person or the delivery of any document or object" (emphasis added). *Docket Document No. 7, Exh. 1.* Through the executive order, Defendant Calderón ordered the Department of Justice and the other agencies under the authority of La Fortaleza to provide the Commission with the support necessary for it to successfully complete its mission. *Id.*

At the hearings before the Commission, Plaintiffs were not advised of any specific right that may have attached to them in relation to the Commission's investigation. Plaintiffs were not informed that they had a right to an attorney. Plaintiffs were not advised that they had a right to confront and cross-examine witnesses testifying against them, and they were not given any opportunity to present testimonial evidence from other witnesses. There is nothing in the record showing that Plaintiffs were even informed of the names of the witnesses testifying against them. Plaintiffs were not permitted to record the proceedings, and they were not even allowed to take notes. One of the Commission's investigators, attorney Vilá-Pérez, explained to Plaintiff Pagán that his requests were denied because the hearing was akin to a grand jury proceeding.

Appendix C

Following these hearings and after the conclusion of the investigation, Defendants held news conferences accusing Plaintiffs of criminal misconduct. More importantly, Defendant Calderón referred the Commission's findings and the evidence it had obtained to the Department of Justice for further action.

We find that on these facts, no reasonable official could have understood that the Blue Ribbon Commission operated in a manner that respected Plaintiffs' due process rights. Accordingly, we conclude that Defendants are not protected by the defense of qualified immunity.

VI.

Conclusion

It is beyond peradventure that individuals in positions of public trust must maintain the highest standards of integrity with respect to the disbursement of public funds. We do not pass judgment on whether, in fact, Plaintiffs Aponte and Pagán committed misconduct in connection with the transactions investigated by the Blue Ribbon Commission. For purposes of the present case, Plaintiffs' guilt or innocence is irrelevant. We simply hold that the procedures applied by the Commission in its investigations were fundamentally unfair to persons who were being investigated by the Commission, and those procedures infringed upon Plaintiffs' due process rights under the Constitution.

> 'Secret inquisitions are dangerous things justly feared by free men everywhere. They are the

> breeding place for arbitrary misuse of official power. They are often the beginning of tyranny as well as indispensable instruments for its survival. Modern as well as ancient history bears witness that both innocent and guilty have been seized by officers of the state and whisked away for secret interrogation or worse until the groundwork has been securely laid for their inevitable conviction.'

Hannah, 363 U.S. 420, 496 (1960) (Douglas, J., dissenting) (internal citation omitted).

We **DECLARE** that the procedures employed by the Blue Ribbon Commission violate the due process clause of the Fourteenth Amendment of the United States Constitution. This court **GRANTS** Plaintiffs' request for a permanent injunction prohibiting Defendants from holding investigative hearings without providing individuals under investigation substantial opportunity to present testimonial and documentary evidence on their behalf and to confront and cross-examine witnesses. This injunction is binding upon Defendants, as well as their agents and employees. *See* FED. R. CIV. P. 65(d).

The exhibits to the Commission's Barbosa 306 and PRIME reports, as well as the other sworn statements and notes of interviews of witnesses obtained by the Commission over the course of these investigations, will be made available to Plaintiffs. The purpose of this disclosure is to partially refund Plaintiffs for the void left by the practices of the Blue Ribbon Commission that negated fundamental fairness to these investigated Plaintiffs. To do otherwise would grant

Defendants a windfall to which they are not entitled. This minimal reparation stands pale compared to the injuries suffered.

This court **PARTIALLY GRANTS** Defendants' motion to dismiss the complaint, and we hereby **DISMISS** Plaintiffs' First Amendment and equal protection claims. *Docket Document Nos. 13, 16.* We **DENY** Defendants' motions to dismiss Plaintiffs' due process claims, *Docket Document Nos. 13, 16, 25,* and we **DENY** Plaintiffs' motion for summary judgment, *Docket Document No. 21.*[14]

A scheduling order on the remaining triable issues will be entered.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 29th day of November, 2001.

s/ Jose Antonio Fuste
JOSE ANTONIO FUSTE
U.S. District Judge

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14. The issues raised in Plaintiffs' motion for summary judgment have already been addressed by this court in the context of Plaintiffs' request for injunctive relief.

Appendix C

ADDENDUM "A"

CITIZENS INDEPENDENT COMMISSION TO EVALUATE GOVERNMENTAL TRANSACTIONS

GUIDELINES FOR INVESTIGATION AND DRAFTING OF REPORTS

ARTICLE ONE — LEGAL BASIS AND PURPOSES

We adopt the following guidelines for investigation by virtue of the authority conferred by Executive Order issued by Honorable Sila Calderon, Governor of Puerto Rico, on January 31, 2001, Administrative Bulletin Number 2001-06, which creates the Citizens Independent Commission to Evaluate Governmental Transactions, and the powers and faculties inherent upon the same.

The objective of the instant guidelines for investigation is to establish the environment of the faculties delegated upon the Commission's personnel to summon witnesses, to take statements, and to require the production of documents, as well as to set forth the guidelines for conducting interviews, and for drafting the findings, product of the analytical process of the evidence compiled. We adopt by reference the provisions and terms defined in the Internal Operational Regulations of the Commission.

The commission, its members and its personnel must maintain the investigative process of the Commission, within the constitutional precepts of due process of law, and equal protection under the law in its dealings with witnesses,

individuals, officials, and public employees, who may be invited or summoned to appear before same. All matters pertaining to interview methodology and techniques, and to the taking of statements from witnesses shall be governed by the internal guidelines set forth herein. Said methodology and techniques, as well as the information derived as a product of their application, may not be divulged to persons foreign to the Commission.

ARTICLE II — DELEGATION OF FACULTIES

A. We hereby delegate the following faculties upon members of the Commission's personnel who hold functions of investigation, auditing and legal counseling:

1. Summoning witnesses, and conducting interviews, in accordance with the provisions of articles III, IV and V of these guidelines.

2. Transacting the taking of oaths and sworn statements by persons competent to do so.

3. Requesting assistance from pertinent officers of the Executive Branch, in order to achieve the obtaining from any natural or artificial person, of oral testimony and of books, letters, documents, and any other object which may be necessary for a complete knowledge of the matter under investigation.

B. Any exercise of the faculty delegated herein shall be previously consulted with the full Commission, which must approve same. In case of urgent circumstances, the president

may grant approval to a petition formulated and subsequently refer the matter to the Commission for its knowledge and determination.

ARTICLE III — SUMMONS

A. The members of the Commission's personnel who have been delegated this faculty may summon witnesses verbally, personally, or by telephone for the purposes indicated in Article II, item A of these guidelines, when the witnesses are willing to appear voluntarily.

B. Whenever it may be necessary, or convenient to issue a summons in writing, it shall be done in the established official form, according to the instructions indicated hereinafter:

1. The summons must be addressed to the person to be interviewed, or interrogated. They must clearly indicate the date and time of the appointment, the name of the person before whom the witness must appear, and the physical address and telephone numbers of the place where the meeting or the taking of the statement is going to take place.

2. The summons shall be served adequately in advance of the date and time of the appearance and, if necessary, the summoned person shall be informed to bring with him/her the objects or documents pertaining to the investigation which may be deemed pertinent. The requests for production of evidence shall be as specific as possible.

3. The summons shall contain the signature, name and title of the Commission's Executive Director, or in the alternative, of the President or of any of the Commissioners designated to do so. Once completed, the summons shall be stamped with the seal of the Commission, and it shall be served. This procedure shall take place by personally delivering a copy to the person summoned, or to an authorized representative, who must sign the original or another copy of same. In the alternative, it shall be certified in an appropriate location place within the form that the summons was delivered to the summoned person, by the process server, stating the circumstances of the service. The execution of the service of summons shall not be affected if the person summoned refuses to sign.

4. The summons for the appearance of witnesses or for the production of documents may be served by a member of the Commission's personnel who is not the person who issued same, or by persons working for the governmental agencies designated by the Executive Order to provide support for the Commission. The summons may be served by certified mail with return receipt requested, whenever the correct mailing address is known.

5. If the persons summoned fail to appear on the date, time and place indicated, or if having appeared, they still refuse to testify, completely or partially, and/or if they refuse to deliver, completely or partially, the documents or objects that were requested from them, the member of the Commission's personnel who issued the summons will inform the Commission, which will determine what actions to take. This may include stating the behavior of the

summoned person in the report to be rendered by the Commission in its day, and/or requesting the assistance of pertinent officers of the Executive Branch so that, through the mechanisms provide by law, they secure the appearance and testimony of the person, and/or the delivery of the documents or objects required; and/or to refer the matter to the corresponding governmental agency so that said agency may take whatever measures in their own judgment they deem necessary.

ARTICLE FOUR — INTERVIEWS AND TAKING OF STATEMENTS

A. The interviews and the taking of statements from witnesses shall be conducted by the member of the Commission's personnel in charge of the investigation, who may be accompanied by another member of the personnel designated do so, who will serve as an assistant in the recording or transcription of the statements in the meeting or as a witness to the events. The person in charge of the investigation may request the presence of a Prosecutor, or a representative from the Department of Justice during any interview, whenever in his/her judgment it may serve to advance the purposes of the interview.

B. The interviews and interrogatories may be recorded on magnetic tape, diskettes, or by any other means such as shorthand or stenography, to be later transcribed and certified as correct by the person who conducted the interview, and the one who made the transcript. They may also be taken in handwriting or directly to a machine while the witness is testifying.

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C. During the interviews of witnesses who are not suspects of having incurred in violations of law or of regulations with penal consequences, the presence of attorneys shall not be allowed, nor that of persons foreign to the Commission, except whenever it may be strictly necessary so that the interviewee will reveal all of the information that he/she may have. In those cases, the person accompanying the deponent will be advised that he/she may not interfere in any form or fashion in the investigative process.

D. In order to protect the confidentiality of the evaluations that the Commission must perform, it is absolutely forbidden to provide witnesses with copies of the statements rendered by them, or to allow them to record the interviews or to take notes regarding the questions formulated or their answers. The witness will only be allowed to examine that evidence relevant to the matter under investigation, whenever this may contribute to advance the purposes of the interview.

E. When a person is being interviewed, who is suspected of having incurred in violations of law or of regulations which are of a penal nature, the person shall be advised of his/her constitutional rights. If the person decides to testify voluntarily, the advisements formulated shall be made part of the body of the statement, as well as the fact that the person has assured that he/she has understood same, and that he/she has decided to testify freely, and consciously. If the person should refuse to testify, a minute shall be taken of all of the details of the events that have transpired. The Commission must be notified of this fact, and it will take whatever measures are necessary for the continuation of the proceedings.

F. At any moment during the process of the investigation, in which the person in charge of same has any evidence, further than a mere suspicion, that someone may have incurred in criminal conduct, he/she shall immediately report this to the Commission. Once the commission has verified the preceding, it may refer the matter to the Department of Justice for whatever action said agency may deem appropriate.

G. The Commission shall use for the purposes of its own investigations, all of the evidence obtained by the Department of Justice, or any other governmental agency with powers of investigation, which said agencies have decided in their sound judgment to share with the Commission.

ARTICLE FIVE — RECEIVING INFORMATION FROM CITIZENS

A. The spontaneous contribution of data or situations arriving from citizens may be taken through the corresponding form created to that effect, for the analysis and classification of same. When the information submitted does not enter the realm of what the Commission has been entrusted to perform, the person shall be advised regarding that fact, and in appropriate cases, the person will be referred to the pertinent agency.

B. When a person has voluntarily offered to provide information to the Commission, but wishes to do so in an anonymous manner, the member of the Commission's personnel who has attended to that person shall urge the informant to reveal his identity. If the informant insists on

remaining anonymous, the information offered shall be received, but said information may only be used to identify matters which may merit investigation in an independent manner. Likewise same shall be done with anonymous information received in writing. The findings to be included in the Commission's report shall be based exclusively on the results obtained through independent investigation, and they will never be based directly upon anonymous information.

ARTICLE SIX — DRAFTING OF FINDINGS

A. The personnel will keep the Commission duly informed of the progress and results of the investigations, through periodic reports, either verbally or in writing. When drafting the reports, they shall always take into account the constitutional principle of presumption of innocence, and the norm that the actions of governmental agencies are covered by a presumption of regularity and correction.

B. The evidence compiled during the investigation which may serve as a basis for the evaluation and recommendations of the Commission shall be forwarded to the Governor together with the report that the Commission will render to her. Said report may include recommendations in a short-term or long-term basis for the taking of those measures which the Commission may consider convenient, including, but not limited to, suggestions for the adoption of new statutory or regulatory guidelines which govern the transactions under study, or for the modification of existing regulations, or to proceed with administrative, civil or criminal efforts against determined persons.

Appendix C

ARTICLE SEVEN — EFFECTIVE TERM

These norms shall become effective subsequent to their approval by the Commission.

CERTIFICATE: I certify that the instant Guidelines for Investigation and Drafting of Reports were adopted by the Citizens Independent Commission for the Evaluation of Governmental Transactions by unanimous vote of its Commissioners, during the regular meetings of the Commission on February 27, and March 27, 2001.

(Signed; Illegible)
Ms. Brenda N. Leon-Suarez
Executive Director

Appendix C

ADDENDUM "B"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MINUTE OF IN-CHAMBER PROCEEDINGS:

HONORABLE **JOSE A. FUSTE** DATE: 11-29-01

COURTROOM DEPUTY:
BECKY AGOSTINI CV. NO: 01-1963

DANIEL PAGAN, ET. AL.

vs.

SILA MARIA CALDERON, ET. AL.

The Court marks as exhibits two groups of documents related to trial exhibits Plaintiffs' Exhibits 4 and 8. Plaintiffs' Trial Exhibit 4 is the Barbosa 306 Report issued by the Blue Ribbon Commission. Court's Exhibits 4-1, 4-2, 4-3 are the exhibits to the Barbosa 306 Report (4-1 contains the exhibits to the Barbosa 306 Report; 4-2 are Sworn Statements related to the Barbosa 306 investigation, and exhibit 4-3 contains the reports of interviews). Regarding Plaintiffs' Trial Exhibit 8, (the Blue Ribbon Commission Report of the PRIME transaction), the Court's Exhibits are as follows: Court's Exhibit 8-1 corresponds to the PRIME Report Part II, and Court's Exhibit 8-2 corresponds to the Sworn Statements and reports of interviews generated in that investigation.

s/ Rebecca Agostini
Rebecca Agostini, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING EN BANC DATED APRIL 25, 2002

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 01-2705

JORGE E. APONTE; DANIEL PAGÁN,

Plaintiffs, Appellees,

v.

SILA MARÍA CALDERÓN; ADOLFO KRANS; CONJUGAL PARTNERSHIP, KRANS-CALDERÓN,

Defendants, Appellants.

DAVID NORIEGA-RODRÍGUEZ; ILEANA COLÓN-CARLO; CARMEN RITA VÉLEZ-BORRÁS; PEDRO GALARZA; PEDRO LÓPEZ-OLIVER; ANGEL HERMIDA,

Defendants.

Appendix D

No. 01-2706

JORGE E. APONTE; DANIEL PAGÁN,

Plaintiffs, Appellees,

v.

DAVID NORIEGA-RODRÍGUEZ;
ILEANA COLÓN-CARLO;
CARMEN RITA VÉLEZ-BORRÁS; PEDRO GALARZA;
PEDRO LÓPEZ-OLIVER; ANGEL HERMIDA,

Defendants, Appellants.

SILA MARÍA CALDERÓN; ADOLFO KRANS;
CONJUGAL PARTNERSHIP, KRANS-CALDERÓN,

Defendants.

Before

Boudin, *Chief Judge*,
Torruella, Selya, Lynch and Lipez, *Circuit Judge*.

ORDER OF COURT

Entered: April 25, 2002